

Polygam's Inscrutable Criminal Mischief

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Abstract

The polygamy charges laid in the settlement of Bountiful, British Columbia, in January 2009, give rise to questions about the particular mischief of the polygamy offence in section 293 of Canada's Criminal Code. This article argues that, as a result of developments within related areas of law, polygamy's mischief under the current wording of the section is virtually inscrutable. When used, this section has principally served as a mechanism to discipline socially and politically marginalized groups. Developments in family law over the last forty years have generated a host of exceptions to the application of the polygamy section, including religious marriage, unmarried cohabitation, and adulterous relationships. Furthermore, the wording of the polygamy section hinges upon a key concept--conjugal--which derives its meaning from family law, and, in this domain, the concept of conjugal has degenerated to the point of unintelligibility. As a result, the targeted harm in the polygamy provision is rendered vague. In its jurisprudential and social context, section 293 is unconstitutional under section 7 of the Canadian Charter of Rights and Freedoms, and the provision should be declared void for vagueness. The article presents alternatives to the criminalization of polygamy in order to address concerns about the vulnerabilities of women and children living within oppressive polygamous relationships.

Keywords

Polygamy--Law and legislation--Criminal provisions; Freedom of religion; Canada. Canadian Charter of Rights and Freedoms; Canada

Polygamy's Inscrutable Criminal Mischief

SUSAN G. DRUMMOND *

The polygamy charges laid in the settlement of Bountiful, British Columbia, in January 2009, give rise to questions about the particular mischief of the polygamy offence in section 293 of Canada's Criminal Code. This article argues that, as a result of developments within related areas of law, polygamy's mischief under the current wording of the section is virtually inscrutable. When used, this section has principally served as a mechanism to discipline socially and politically marginalized groups. Developments in family law over the last forty years have generated a host of exceptions to the application of the polygamy section, including religious marriage, unmarried cohabitation, and adulterous relationships. Furthermore, the wording of the polygamy section hinges upon a key concept—conjugalité—which derives its meaning from family law, and, in this domain, the concept of conjugalité has degenerated to the point of unintelligibility. As a result, the targeted harm in the polygamy provision is rendered vague. In its jurisprudential and social context, section 293 is unconstitutional under section 7 of the *Canadian Charter of Rights and Freedoms*, and the provision should be declared void for vagueness. The article presents alternatives to the criminalization of polygamy in order to address concerns about the vulnerabilities of women and children living within oppressive polygamous relationships.

Les accusations de polygamie portées en janvier 2009 dans le règlement de la cause Bountiful, en Colombie-Britannique, soulèvent des questions sur l'infraction particulière du méfait de la polygamie en vertu de l'article 293 du Code criminel du Canada. Cet article fait valoir qu'à la suite de développements intervenus dans des domaines liés à la législation, le méfait de la polygamie en vertu du libellé actuel de l'article est virtuellement impossible à définir. Lorsqu'on y recourt, cet article a essentiellement servi de mécanisme visant à prendre des mesures disciplinaires envers des groupes marginalisés aux plans social et politique. Les développements en droit de la famille au cours des quarante dernières an-

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nées ont engendré une myriade d'exceptions quant à l'application de l'article sur la polygamie, y compris le mariage religieux, l'union de fait et les relations adultères. En outre, le libellé de l'article sur la polygamie s'articule autour d'un concept clé – le lien conjugal – qui tire sa signification du droit de la famille et, en ce domaine, ce concept du lien conjugal a dégénéré jusqu'au point de l'inintelligibilité. Par conséquent, le préjudice ciblé par la disposition sur la polygamie est devenu vague. Dans son contexte jurisprudentiel et social, l'article 293 est inconstitutionnel en vertu de l'article 7 de la Charte canadienne des droits et libertés, et la disposition devrait être déclarée nulle en raison de son imprécision. L'article présente des solutions de rechange à la criminalisation de la polygamie, afin d'aborder les préoccupations relatives à la vulnérabilité des femmes et des enfants qui vivent au sein de relations polygames abusives.

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THE LEGAL HISTORY¹ PRECEDING the polygamy charges² that were laid in the settlement of Bountiful, British Columbia, against two men—both members and leaders of the Fundamentalist Church of Jesus Christ of the Latter Day Saints (FLDS)—in January 2009, have already stimulated a re-evaluation of how Canada conceives, and should conceive, legitimate intimacy and the legitimate family. The fact that the charges were dropped on 23 September 2009—leaving the men free to go—has left a puzzling disjuncture between the law on the books and the practical law, which is no less a stimulant, about where we stand in

1. For a good synopsis of this history, see *Blackmore v. British Columbia (Attorney General)*, [2009] B.C.J. No. 1890 at para. 7ff [*Blackmore*].

2. See Robert Matas & Wendy Stueck, "Polygamy Charges in Bountiful" *The Globe and Mail* (7 January 2009), online: <<http://www.theglobeandmail.com/news/national/article/963758.ece>>.

Canada with regard to the status of polygamy.³ This disjuncture will be further pronounced: the most foreseeable outcome of the decision to quash the charges will be a constitutional reference to the British Columbia Court of Appeal to determine whether or not the polygamy section can withstand *Charter* scrutiny.

Blackmore v. British Columbia makes it clear that the 2007 reasoning of Richard Peck, QC (the first special prosecutor assigned by Wally Opal, the Attorney General of British Columbia), was final, and ought not to have been second and third guessed by the appointment of subsequent special prosecutors who, for all appearances, were assigned to increase the chances of the Attorney General getting a prosecutorial recommendation that was more closely aligned with his wishes.⁴ Peck was clear that the prospects of a prosecution that would secure a conviction were very uncertain as a result of the conflict of the polygamy section with the freedom of religion section of the *Canadian Charter of Rights and Freedoms*.⁵ Given the years of uncertainty generated by the opinions of not only three prosecutors, but also by the "lengthy passage of time since the first expression of police interest in Bountiful, and the existence of prior Crown opinions regarding the constitutionality of s. 293,"⁶ Peck felt strongly that the public interest would be best served by "an authoritative and expeditious judicial resolution of the legal controversy surrounding polygamy."⁷

As the prosecutorial history in British Columbia strongly suggests, the current formulation of section 293—the polygamy section—is constitutionally inadequate. Under the circumstances, a call for Parliament to revisit the offence of polygamy *de novo* is not unlikely. Given the heated policy issues on both sides of the polygamy debate, this article takes the current moment of calm before the next storm to gain a new understanding of the relationship between the state and religious minorities (in addition to other norm-generating communities).

In light of the Bountiful polygamy charges, and a foreseeable constitutional reference, Canada may find itself facing the stark reality of how Canadian family and intimate life has been shaped over the last forty years (*i.e.*, since the *Divorce*

3. *Blackmore*, *supra* note 1.

4. *Ibid.* at para. 88ff.

5. *Canadian Charter of Rights and Freedoms*, s. 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

6. *Blackmore*, *supra* note 1 at para. 20.

7. *Ibid.* at para. 21.

Act (1968)⁸ and Prime Minister Trudeau's ushering of the state from the bedrooms of the nation's consenting adults⁹). It may find that the sociological, jurisprudential, and legislative shifts during this period have placed Parliament in such a position that it cannot identify a specific mischief in the polygamy section that is not simultaneously permitted elsewhere in law.

Given the religious background of the accused men, and that their faith has already figured so prominently in the public stance taken up by the defence,¹⁰ the charges should stimulate far more than a review of the role played by polygamous relationships within the growing diversity of legitimate Canadian family structures. The minority religio-cultural dimension of the Bountiful cases will gain even more attention, precisely because of polygamy's inscrutable criminal mischief. In light of the vagueness and overbreadth of the current legislation in this area, I argue that the state has left itself free to launch a "standardless sweep,"¹¹ driven by the predilections of law enforcement officials. These predilections appear to have brought religious minorities, particularly Fundamentalist Mormons, within their sights.

The vociferous crowd that exhorted the Attorney General of British Columbia to pursue the Bountiful prosecutions was convinced that, whether or not there is a deep harm associated with polygamy in and of itself, the relational arrangement is a Gordian knot that is inextricably tangled with very grave social harms, such as the sexual exploitation of—and sexual interference with—minors, the marriage of underage children to adults, and the subjugation and oppression of women.¹² In

8. *Divorce Act*, S.C. 1967-68, c. 24 [*Divorce Act* (1968)].

9. Pierre Trudeau, "There's No Place for the State in the Bedrooms of the Nation" *CBC Television News* (broadcast 21 December 1967) in CBC Digital Archives, "Trudeau's Omnibus Bill: Challenging Canadian Taboos," online: <http://archives.cbc.ca/politics/rights_freedoms/topics/538/>.

10. "Bountiful Leader calls Polygamy Charge 'Religious Persecution'" *CBCNews.ca* (8 January 2009), online: <<http://www.cbc.ca/canada/british-columbia/story/2009/01/08/bc-polygamy-winston-blackmore.html>>.

11. This is the language of one of the leading cases on laws held to be void for vagueness. See *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at para. 41 [*Prostitution Reference*].

12. See Daphne Bramham, *The Secret Lives of Saints: Child Brides and Lost Boys in Canada's Polygamous Mormon Sect* (Toronto: Random House, 2008) [Bramham, *The Secret Lives*].

this climate of generalized anxiety about possible misconduct in the Bountiful community, it is important to point out that not a single charge has been laid for these latter harms, only two of which—sexual exploitation and sexual interference—constitute criminal offences.¹³

If evidence exists that men in Bountiful have sexually exploited or interfered with young people, charges should be laid under the aforementioned sections of the *Criminal Code*. The religious background of the defendants is irrelevant to the validity of these charges. Religious freedom, protected under section 2(a) of the *Constitution Act, 1982*,¹⁴ does not extend to the protection of religious practices that harm the integrity of young people in this particularly pernicious way. However, none of the three special prosecutors that the Attorney General hired (one after the other) to ferret out evidence of crimes and misdemeanors in Bountiful uncovered sufficient evidence to prosecute.¹⁵ As defence counsel shrewdly elected to proceed with a trial in the Superior Court of British Columbia,¹⁶ the Crown was precluded from going on a fishing expedition for more evidence of alleged lateral offences through a preliminary inquiry.¹⁷

I will leave the argument of whether or not the subjugation and oppression of women should be a criminal offence to those more ideologically driven than myself. However, the other tangle in polygamy's Gordian knot—underage marriage—is not a criminal offence in Canada. Furthermore, in the area of civil law, "the state of this law is deplorable,"¹⁸ and has left federal common law to determine the age of consent to marriage. This antiquated body of law permits

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13. *Criminal Code*, R.S.C. 1985, c. C-46, s. 153 (as amended by R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 4; 2008, c. 6, s. 54) [*Criminal Code*].
 14. *Constitution Act, 1982*, s. 2(a), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Constitution Act, 1982*]. See also *Charter*, *supra* note 5, s. 2(a).
 15. See e.g. Richard C.C. Peck, QC, *Report of the Special Prosecutor for Allegations of Misconduct Associated with Bountiful, BC: Summary of Conclusions*, online: <<http://www.canada.com/vancouver/news/extras/bountiful.pdf>>.
 16. See Daphne Bramham, "Accused Polygamist to Use Gay-marriage Laws as Defence: Case Held Over Until Feb. 18 as Lawyers Gather Evidence" *Canada.com* (22 January 2009), online: <<http://www.canada.com/topics/news/story.html?id=1202730>>.
 17. Such an inquiry might be conducted in part by calling women and other members of the community to testify under oath about any evidence relevant to the presumed harms of polygamy.
 18. See Simon R. Fodden, *Essentials of Canadian Law: Family Law* (Toronto: Irwin Law, 1999) at 20.

Canadian children to marry at age seven¹⁹—the marriage being merely voidable until the age of twelve for girls and fourteen for boys, after which point it becomes fully valid.²⁰ As a result of these various disqualifications, polygamy, in and of itself, remained the focus of criminal inquiry in the Bountiful cases, effectively disentangled from the other presumed knots of criminal intrigue such as under-age marriage, and sexual exploitation and interference.

In this article, I argue that the mischief in the *Criminal Code*'s polygamy section is inscrutable to the reasonable person with ordinary powers of discernment. Such powers are informed by a mundane immersion in the complex social norms and debates that relate to the intimate and familial life that has emerged since the late 1960s. Polygamy's mischief is also inscrutable to those with more focused lenses, who are trained to discern the intelligibility that emerges out of the more rarified and picayune normativity of both common law and statute. The meaning of the polygamy section, for both amateur and expert audiences, is vague. Beyond being merely vague in legal and social import, however, the provision itself is vague, and it should therefore be declared "void for vagueness" in conjunction with section 7 of the *Charter*.²¹

The concept of conjugality is the most credible fulcrum on which to hinge the intelligibility of the polygamy section. This provision places in jeopardy everyone who enters into "any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage."²² This concept of conjugal union appears broad enough to include those who are civilly married, those who are religiously, culturally, or customarily bound to each other, those who are intimately connected with each other, and those who are otherwise cohabiting in a spouse-like relationship.

However, the polygamy section has to be examined in the context of the Canadian legal system as a whole. I argue that both case law and statutes—in

19. This is the law for children in the common law provinces of Canada. The *Federal Law – Civil Law Harmonization Act* changed the law for Quebec alone, so that the minimum age for marriage in Quebec is now sixteen. See *Federal Law – Civil Law Harmonization Act*, No. 1, S.C. 2001, c. 4, s. 6.

20. Fodden, *supra* note 18 at 20. See also Mary Jane Mossman, *Families and the Law in Canada: Cases and Commentary* (Toronto: Emond Montgomery, 2004) at 82; Berend Hovius, *Family Law: Cases, Notes and Materials*, 6th ed. (Toronto: Thomson Carswell, 2005) at 131.

21. *Charter*, *supra* note 5, s. 7.

22. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

family law, in cognate areas of the criminal law, and under the polygamy section itself—have carved significant chunks of intelligibility out of any intuitive meaning of conjugality for the purposes of the polygamy provision. Whatever intelligibility remains is problematically vague for the criminal law.

I will demonstrate that this jurisprudential evisceration of possible readings of polygamy leaves the section with a fraught history of persecution against social, political, and religious minorities, while leaving its residual definitional content—conjugality—devoid of a specific meaning. The jurisprudential concept of a conjugal (or spouse-like) relationship in family law has degenerated to the extent that it fails to provide sufficient interpretive guidance for anticipating when one is in such a relationship, or how one can avoid such a situation—an affliction that is troubling in family law, and fatal to the criminal law. The common law definition of conjugal union has no essential elements. Conjugal unions do not need to be sexual in nature to exist, and the parties to a conjugal union do not need to share a residence, pool domestic tasks and assets, or have generated a social perception of conjugality. The cluster of marriage-like features is intentionally flexible, and judges are left to an “I know it when I see it approach.”²³

As a result of major shifts in values within family law, the polygamy offence no longer coincides with the contemporary substratum of values about family and sexuality, which have emerged over the last forty years in Canadian law and society. The relevance of *formal*²⁴ conjugality—triggered by marriage, extinguished by divorce, and shielded in between by privacy—has been turned inside-out by the sociological and legal significance of *functional*²⁵ conjugality. For the latter

23. This point is made in Brenda Cossman & Bruce Ryder, “What is Marriage-Like Like? The Irrelevance of Conjugality” (2001) 18 Can. J. Fam. L. 269 at 299 [Cossman & Ryder, “Marriage-Like”]. I return to this article below in the discussion about the meaning of “conjugality.”

24. By formal, I mean state-generated (*i.e.*, civil) marriage.

25. To track developments in this direction, see Brenda Cossman & Bruce Ryder, “The Legal Regulation of Adult Personal Relationships: Evaluating Policy Objectives and Legal Options in Federal Legislation” (Originally prepared for the Law Commission of Canada, 1 May 2000), online: <http://dalspace1.library.dal.ca/dspace/bitstream/handle/10222/10259/Cossman_Ryder%20Research%20Regulation%20Adult%20Relationships%20EN.pdf?sequence=1>; Brenda Cossman & Bruce Ryder, “Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships” (Originally prepared for the Law Commission of Canada, 21 December 2001), online: <<http://www.samesexmarriage.ca/docs/>

construct, the content of intimate and familial relationships has become an alternate focus of legal scrutiny. Meanwhile, the contemporary range of sexual and familial diversity deprives *functional* conjugality of the bright-line coherence that it might have once had in an era where the range of 'normal' families was quite narrow. Conjugality itself appears to be collapsing into uncertainty and incoherence in its most familiar domain: family law.²⁶ These parallel developments in the socio-legal conceptions of family and intimacy have outpaced a polygamy offence that has been virtually unused since the first *Criminal Code* of 1892. As a result, the polygamy offence has collapsed into the disintegrating concept of conjugality, rendering the harm that it targets all the more inscrutable.

Taking into account all of these statutory and jurisprudential understandings of what constitutes a "form of marriage,"²⁷ "any form of polygamy,"²⁸ and "any kind of conjugal union, whether or not it is by law recognized as a binding form of marriage,"²⁹ it becomes virtually impossible to articulate what the criminal conception of bigamy or polygamy amounts to, and what the core mischief is that underlies it. It also becomes virtually impossible for the provisions to provide fair notice that particular conduct falls within the scope of the offence. Thus, criminal law is the wrong instrument for addressing worries about the vulnerabilities of women and children within plural family arrangements. As the final section of this article demonstrates, these legitimate anxieties about women and children can be addressed through a plethora of alternative regulatory means, none of which assail fundamental principles of justice entrenched in the constitution.

I. CHARTER TROUBLE: VOID FOR VAGUENESS

With the polygamy section left as the only possible offence under which the accused men in the Bountiful cases were subject to conviction, deciphering its specific harm would have become the central preoccupation of not just the parties involved in the cases, but the general public as well. A constitutional reference will further remove the polygamy provision from the factual nexus in any par-

beyond_conjugality.pdf>. For a reference to the discussion surrounding *functional* conjugality, see Cossman & Ryder, "Marriage-Like," *supra* note 23.

26. *Ibid.*

27. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

28. *Ibid.*

29. *Ibid.*

ticular community, bringing the *Charter* issues to the forefront. Deciphering the harm in polygamy will thus demand a broader order of inquiry—beyond the community of Bountiful—and the Crown will be compelled to locate the pressing and substantial objective that drives the legislation. This objective must be one that is capable of overriding a variety of human rights that are at stake in the prosecutions.

The approach most likely to succeed will be rooted in the claim that section 293 of the *Criminal Code* violates the right to religious freedom that is guaranteed by section 2(a) of the *Charter*.³⁰ This, indeed, has been the recurrent response of the Crown and special prosecutors in British Columbia with regard to the main hurdles in laying charges in the Bountiful context. A challenge to section 293 under section 7 of the *Charter*³¹ (the right to life, liberty, and security of person) is thought by some legal scholars to be less powerful.³² It is suggested that such a challenge would focus on the liberty interest in section 7, as it engages with civil law—specifically with the civil definition of marriage. The Supreme Court of Canada (SCC) has found that liberty is infringed when the law prevents a person from making “fundamental personal choices.”³³ The right to choose whom one marries would be such a paradigmatic, fundamental personal choice.

Under this argument, the liberty to marry both religiously *and* polygamously is broad enough to capture the Bountiful situation, but broader, perhaps, than is necessary for those particular cases. The liberty right guaranteed under section 7 may be more fitting for an independent challenge to the civil definition of marriage that is specified in the *Civil Marriage Act*.³⁴ The latter defines marriage, for civil purposes, as “the lawful union of two persons to the exclusion of all others.”³⁵

30. See Martha Bailey *et al.*, “Explaining Recognition of Foreign Polygamous Marriages: Policy Implications for Canada” in *Polygamy in Canada: Legal and Social Implications for Women and Children – A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2005) at 19, online: <http://epe.lac-bac.gc.ca/100/200/301/swccfc/polygamye/pdf/200511_0662420683_e.pdf> [*Polygamy in Canada*].

31. *Charter*, *supra* note 5, s. 7.

32. Bailey *et al.*, *supra* note 30 at 30. See also Nicholas Bala, “An International Review of Polygamy: Legal and Policy Implications for Canada” in *Polygamy in Canada*, *supra* note 30 at 39.

33. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at paras. 49-54 (and cases cited therein).

34. S.C. 2005, c. 33, s. 2 [*Civil Marriage Act*].

35. *Ibid.* For this s. 7 *Charter* analysis, see Bailey *et al.*, *supra* note 30.

There is another very compelling section 7 argument available—one, I believe, that is fatal for the constitutionality of section 293 of the *Criminal Code*. It can be argued that the polygamy offense is both vague (void for uncertainty) and overbroad, and is therefore a fundamentally unjust violation of the liberty right in section 7 of the *Charter*. Given that a conviction pursuant to section 293 can lead to imprisonment for up to five years, this section carries a far graver threat to liberty than state interference with fundamental personal choices. The *Criminal Code* provisions relating to polygamy, already problematically drafted in 1892, have not kept pace with the effects of federal divorce law since 1968, with the socio-legal changes in the structure of the family, and with other developments within criminal law. In the language of *R. v. Nova Scotia Pharmaceutical Society*³⁶ (another leading case on the void for vagueness doctrine), the “substratum of values”³⁷ that underlies legal enactments and provides the substantive content of fair notice has shifted considerably over the last forty years. The polygamy provision is no longer coincident with that substratum. It is now almost impossible for citizens to foresee what conduct they must avoid in order to remain beyond the reach of section 293. Where citizens are potentially liable to having their liberty deprived, such reasonable foreseeability is critical to ensuring that deprivations of liberty are in accordance with the principles of fundamental justice.³⁸

In particular, the SCC has established that a vague law offends the principles of fundamental justice under section 7 of the *Charter* because:

[i]t is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards. ... This is especially important in the criminal law, where citizens are potentially liable to a deprivation of liberty if their conduct is in conflict with the law.³⁹

The difficulty with the ways in which the current *Criminal Code* provisions have been interpreted, and the ways in which they have interacted with or been overtaken by developments in private law, has precluded reasonable

36. [1992] 2 S.C.R. 606 [*NS Pharmaceutical*].

37. *Ibid.* at para. 48.

38. See *Prostitution Reference*, *supra* note 11 at para. 38.

39. *Ibid.* at para. 34.

foresight of what can be considered to be legal and illegal behaviour with respect to multiple partners.

The provisions on their own are astonishingly overbroad, referring to "any form of polygamy" and "any kind of conjugal union whether or not it is by law recognized as a binding form of marriage."⁴⁰ For example, a party in the common situation of living separate and apart from a civil spouse while waiting for a civil divorce, but who begins to live with another spouse with whom he or she wants to build a life, is captured by the provision.⁴¹ Additional proof that the provision's language is overbroad can be found in the radical dissonance between the proclaimed contemporary objective of the provision and its consequences. Protecting the vulnerabilities of women and children is sometimes taken to be the pressing and substantial objective that replaced the religiously discriminatory objective in the *Criminal Code* when amendments were made to the polygamy offence in the 1950s.⁴² Yet, not only is the net of this provision cast broadly over a vast range of relationship configurations, it is calibrated to catch "[e]very one"⁴³ who is in one of these forbidden relationships.

This concept of "[e]very one"⁴⁴ includes women in plural marriages. As has been argued effectively elsewhere,⁴⁵ these women are in just as much jeopardy as men, since they are also liable to spend up to five years in prison. This criminalization of their relationships renders them far less likely to come forward and assert their rights under areas of law that do protect their vulnerabilities, such as division of matrimonial property, spousal support, and child support.⁴⁶

The excessive scope of the provision is a concern that is closely related to its

40. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

41. For the jurisprudential understanding of what makes a provision too broad, see *R. v. Heywood*, [1994] 3 S.C.R. 761.

42. For the feminist argument, see Department of Justice Canada, *Polygyny and Canada's Obligations Under International Human Rights Law* by Rebecca J. Cook & Lisa M. Kelly (Ottawa: Family, Children and Youth Section, 2006); See also Bala, *supra* note 32.

43. *Criminal Code*, *supra* note 13, s. 293.

Every one who (a) practises or enters into or in any manner agrees or consents to practise or enter into (i) any form of polygamy, or (ii) any kind of conjugal union with more than one person at the same time, ... is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. [emphasis added]

44. *Ibid.*

45. See Bailey *et al.*, *supra* note 30 at 17.

46. *Ibid.*

potential vagueness. Both concerns form the basis of “the minimum standard for the formal content of law demanded by principles of fundamental justice.”⁴⁷ Based on the criterion used by Justice Gonthier to hold a law as void for vagueness, the far-reaching polygamy provision may be determined to be “so devoid of precision in [its] content that a conviction will automatically flow from the decision to prosecute.”⁴⁸ Thus, not only does this provision open the door to a “standardless sweep,”⁴⁹ it also opens the door for “law enforcement officials to pursue their personal predilections.”⁵⁰

In the *Prostitution Reference*, Justice Lamer stresses that the doctrine does not require absolute certainty in its formulation.⁵¹ Further, the doctrine “is not to be applied to the bare words of the statutory provision, but, rather, to the provision as interpreted and applied in judicial decisions.”⁵² The provision, in other words, needs to be read in light of relevant case law. While no law can meet the standard of absolute certainty, both the principle of fair notice to citizens (particularly for criminal law, where individual liberty is in jeopardy) and that of limiting the discretion of enforcement powers, however, strongly indicate that the current polygamy section offends the principles of fundamental justice that are set out in section 7 of the *Charter*. This is particularly so in light of a massive shift in the substratum of values regarding family and sexuality since the late 1960s—a substratum that is accessible to all Canadians who might otherwise lack access to the technicalities of formal notice. Additionally, this substratum provides the moral foreseeability of harm, and generates the substantive notice that, in turn, can inoculate legal enactments from claims of arbitrariness.⁵³ What remains, then, for the purposes of determining whether

47. Jamie Cameron & James Stribopoulos, eds., *The Charter and Criminal Justice: Twenty Five Years Later*, 1st ed. (Markham: LexisNexis, 2008) at 474.

48. *NS Pharmaceutical*, *supra* note 36 at para. 53.

49. *Prostitution Reference*, *supra* note 11 at para. 41. Both this danger and the next were critiqued in Justice Lamer’s disquisition on void for vagueness.

50. *Ibid.*

51. *Ibid.* at para. 40.

52. *Ibid.* See also *NS Pharmaceutical*, *supra* note 36; *Canadian Foundation for Children, Youth and the Law v. Canada* (Attorney General), [2004] 1 S.C.R. 76 [*Canadian Foundation*]; *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 [*JTI-Macdonald Corp.*]

53. *NS Pharmaceutical*, *ibid.* at para. 48.

the polygamy section falls afoul of the doctrine of void for vagueness, is a review of how the provision and its embedded terms have been interpreted and applied in judicial decisions.

Before examining this jurisprudential history, it is worth turning briefly to the provision's socio-legal history. One of the features of a law that is void for vagueness is that it encourages arbitrary and erratic arrests and convictions. In the case of the polygamy section, this concern seems particularly acute, given that the provision was originally drafted in 1892 to target Fundamentalist Mormons,⁵⁴ that a disproportionate number of those convicted under the provision have been Aboriginal men, and that public pressure to prosecute is mostly directed at religious minorities, including Muslims.

II. CIVIL VULNERABILITIES AND STANDARDLESS SWEEPS

The argument that section 293 is vague and overly broad is related to claims that might be made with respect to religious freedom, and also to the argument that the polygamy law discriminates on the ground of religious belief. Any criminal law that is problematically vague or overbroad leaves socially and politically marginalized groups vulnerable to a "standardless sweep"⁵⁵ that might be driven by the predilections of law enforcement officials. In light of their roots, this anxiety seems particularly acute with respect to the polygamy laws.

The historical origins of the polygamy offence are rooted in ecclesiastical policy, dating as far back as the thirteenth century, as part of the vision for society that was seen by the religious faction that happened to be dominant when the laws were promulgated. At the private law level, Canada entered Confederation with a common law definition of marriage that was embedded in the very case that was finally overturned in the recent flurry of same-sex marriage challenges.⁵⁶ *Hyde v. Hyde and Woodmansee*,⁵⁷ now constitutionally objectionable

54. Bala, *supra* note 32 at 28. To this effect, Bala states that:

Polygamy has been illegal in Canada since 1892. This provision was enacted in Canada as part of the first *Criminal Code*, apparently as a result of American influences, as criminal laws were being enacted about that time in the United States to prohibit the practice of polygamy by members of the Mormon Church.

55. *Prostitution Reference*, *supra* note 11 at para. 41.

56. See *Hendricks v. Québec (Procureur général)*, [2002] Q.J. No. 3816 [*Hendricks*]; *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C. J. No. 994 (C.A.) [*EGALE*]; and *Halpern v. Toronto (City)*, [2003] O.J. No. 2268 (C.A.) [*Halpern*].

for its restriction of marriage to one *man* and one *woman*, was, in fact, a case about polygamy—the emphasis in the original case being on *one* man and *one* woman. *Hyde* laid down for all Canadians the civil prohibition on the recognition of polygamous marriages by clearly enunciating the presumed ecclesiastical motif for all forms of legitimate marriage.⁵⁸ This definition prevailed in Canada from 1866-2005, and the prohibition on plural unions for civil marriages is now embedded in the *Civil Marriage Act* of 2005 (and separated from all reference to religiosity).⁵⁹

The very explicitly Christian context of Canadian family law is evident in the civil understanding of polygamy and monogamy. The deliberate setting up of religious minorities (and their conceptions of marriage) as outliers to the dominant religious affiliation of the nascent state is evident from the fact that the plaintiff in the *Hyde* case was a Mormon. Given that, in the words of the judge, “the matrimonial law of this country is adapted to the Christian marriage,”⁶⁰ a marriage under Mormon law was grouped in the same category as marriages formed among “infidel nations”⁶¹—a formation beyond the collective pale.

Canadian anti-polygamy legislation arose directly out of cross-border pressure from the American government to follow a set of statutory persecutions enacted over a period of thirty years against fundamentalist Mormons. This was an agenda, which, in the United States, was closely wed to a political and military campaign against a secessionist movement in Utah that was led by the Mormon founder, Joseph Smith. In response to the secessionist threat in Utah, the US Congress began to pass legislation, starting with the *Morill Act* of 1 July 1862, that was designed to outlaw bigamy and polygamy in the US Territories.⁶² The *Morill Act* inaugurated successive encroachments on Mormon rights, which eventually included the seizure of property and the deprivation of citizenship

57. [1866] 1 L.R.P. & D. 130 [*Hyde*].

58. *Ibid.* at 130 (“Marriage as understood in *Christendom* is the voluntary union for life of one man and one woman, to the exclusion of all others” [emphasis added]).

59. *Civil Marriage Act*, *supra* note 34, s. 2 (“Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others”).

60. *Hyde*, *supra* note 57 at 135.

61. *Ibid.* at 134.

62. See Martha M. Ertman, “Race Treason: The Untold Story of America’s Ban on Polygamy” (University of Maryland, Legal Studies Research Paper No. 2008-37, 26 March 2009) at 9, n. 17, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270023>.

rights such as voting, holding office, and sitting on juries.⁶³ The culmination of a series of these statutes was the *Edmunds-Tucker Act* of 1887,⁶⁴ which tightened the evidentiary noose for successful prosecution.⁶⁵ Shortly thereafter, the majority sect of Mormons capitulated to federal government demands to forfeit polygamy. On the other hand, the FLDS Mormons fled persecution in the United States, and sought refuge in British Columbia and Alberta.

It should not be mistakenly assumed that the nineteenth century American position on polygamy—as articulated in statute books, in the courts, and in public debate—was about gender equality. Apart from the efforts by the federal government to control what they regarded as treacherous Mormon claims to political, economic, and social control of Utah in the late nineteenth century, Martha Ertman has demonstrated that the government was just as preoccupied with how white polygamists were engaged in race treason.⁶⁶ Rejecting Mormon claims that polygamy was protected as the free exercise of religion, *Reynolds v. United States*⁶⁷ (the leading anti-polygamy case from that era) notes that polygamy was “odious among the northern and western nations of Europe ... almost exclusively a feature of the life of Asiatic and of African people.”⁶⁸ Ertman demonstrates how polygamy “provided the justification for the larger culture to demote white Mormons from full citizenship on the grounds of racial inferiority”⁶⁹ and, by an arsenal of such rhetorical devices, was used to forcefully thwart Joseph Smith’s aspirations to establish a separatist theocracy in Utah. As a result, and under pressure from the Americans to criminalize Mormon polygamy, the Canadian Parliament inserted a targeted clause in the polygamy provisions in 1892. This clause was not removed from the *Criminal Code* until 1954.⁷⁰

The racialized and politicized roots of the polygamy doctrine in both the United States and Canada give pause to assertions that it can be invoked without xenophobic taint. However, there are other socio-legal dimensions of the polyg-

63. *Ibid.*

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. 98 U.S. 145 (1878).

68. *Ibid.* at 164.

69. Ertman, *supra* note 62 at 5.

70. See Bailey *et al.*, *supra* note 30 at 23.

amy law in Canada that suggest that it has been used as an instrument of colonization (*i.e.*, through the forceful restructuring of Aboriginal family structures). Since 1892, there have only been a handful of such prosecutions under the code's polygamy sections. One of the more salient of these was *R. v. Bear's Shin Bone*,⁷¹ the 1899 case of a Blood Indian from the North West Territories, Bear's Shin Bone, who was convicted under the polygamy section for entering into simultaneous conjugal unions with two women.⁷² The marriages were formed "Indian fashion,"⁷³ meaning that "he promised to keep her all her life, and she promised to stay with him, and that that was the way Indians got married."⁷⁴

Aboriginal customary law is itself plural and complex, reflecting the plethora of practices engaged in by a diversity of First Nations. However, the concept of marriages formed "Indian fashion," as articulated in *Bear's Shin Bone*, does not belong to Aboriginal customary law, but rather to Aboriginal common law—a body of law built on the middle ground of interactions between Aboriginal peoples and the incoming settlers, and issuing from the common law courts of Canada.⁷⁵ In the domain of family law, this body of mixed common law contains a fairly narrow list of cases, and perhaps an even narrower (and increasingly narrowing) conception of what constitutes customary marriage. The most recent of these common law cases constitutionalizes customary marriage, and it does so in a way that perpetuates the forceful restructuring of First Nations kinship structures that were inaugurated with cases like *Bear's Shin Bone*.

What constitutes an "Indian marriage" is articulated in a manner that may be ethnocentric and offensive to endogenous understandings of customary marriage among Aboriginal peoples. However, it is worth reproducing for its resonance with the contemporary widespread phenomenon of cohabitation. *Bear's Shin Bone* relies on the following conception of "Indian marriage":

It is plain that among the savage tribes on this continent marriage is merely a natural contract and that neither law, custom nor religion has affixed to it any conditions or limitations or forms other than what nature has itself prescribed. ... Wherever mar-

71. (1899), 4 Terr. L.R. 173 [*Bear's Shin Bone*].

72. *Ibid.*

73. *Ibid.*

74. *R. v. Nan-E-Quis-A-Ka* (1889), 1 Terr. L.R. 211 at 211 [*Nan-E-Quis-A-Ka*].

75. See Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.

riage is governed by no statute consent constitutes marriage and that consent is shewn by their living together.⁷⁶

It is hard to suppress the sense that the marriage for which the judge in *Bone* was convicting is closely commensurate with contemporary statutory understandings of unmarried cohabitation. But this common law understanding of Aboriginal marriage is not quite commensurate with cohabitation, as it lacks the requirement (now set out in federal and provincial statutes) for a qualifying period of living together (generally of one to three years), made shorter by the birth of a child.⁷⁷ An Aboriginal marriage under common law criteria is more easily formed than unmarried cohabitation—something that appears to make First Nations people more vulnerable to conviction under the polygamy law.

The contemporary legal way to distinguish between Aboriginal and non-Aboriginal cohabitation is via section 24 of the *Constitution Act, 1867*⁷⁸ and section 35 of the *Constitution Act, 1982*.⁷⁹ The former facilitates the creation of a distinct marriage regime for Aboriginal people under the auspices of federal jurisdiction, and the latter constitutionally protects persisting Aboriginal rights from extinguishment or encroachment without due process and appropriate justification. What might otherwise be functionally analogous to unmarried cohabitation (*i.e.*, living together constitutes consent and consent constitutes marriage) can thereby be elevated for Aboriginal people to the constitutionally-protected status of a customary marriage.

This constitutional security perversely appears to make Aboriginal people particularly vulnerable under the polygamy section. This phenomenon provides a cautionary tale about the availability of these deeply ambiguous provisions to discipline socially and politically-marginalized groups in Canada. In light of these arguments, harm to religious groups and minority communities becomes more salient and poignant. The odour of religious persecution lingers over the offence, particularly when conjoined with the ways in which it has been historically directed or applied to socially and politically-marginalized groups.

76. *Nan-E-Quis-A-Ka*, *supra* note 74 at paras. 3, 6.

77. See *e.g.* *Family Law Act*, R.S.O. 1990, c. F.3, s. 29 [*Family Law Act*] (providing the definition of "spouse").

78. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 24, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1867*].

79. *Constitution Act, 1982*, *supra* note 14, s. 35.

III. FAMILY LAW'S SUBSTRATUM OF VALUES

Although the small handful of cases relating to the polygamy section itself provide some clarity, Canada's polygamy cases have not single-handedly eliminated the confusion surrounding the offence. The criminal law does not exist as a silo that is separated from other areas of Canadian law. It has to be examined in the context of the Canadian legal system as a whole. This approach is particularly justified when a *Criminal Code* provision refers to a concept such as that of the conjugal union—*i.e.*, a concept that is otherwise not defined in the *Criminal Code*, but has instead acquired its flesh and blood from developments within family law. By eliminating some of the ways in which the polygamy section might have been read, it should become clear that the legal construct of the conjugal union has been left to do all of the polygamy offence's work (and it is a construct that is, itself, precarious in law).

This section addresses the civil status of religious marriages, and how the *Divorce Act* (1968) inaugurated a series of changes in the ways in which religious marriages must now be conceived—a conception that was inchoate within Canadian conflict of laws rules. The *Divorce Act* (1968) changed the way that provincial marriage acts must now be read, particularly with respect to religious marriages. The interaction between these federal and provincial family laws shifts the interpretive possibilities of the bigamy section in the *Criminal Code*. These subtle transformations collectively have an impact on the meaning of the words in the polygamy section and the scope of the jeopardy that it envisages. The result of these shifts is that Canadian law tolerates informal (*i.e.*, non-civil) plural unions, as well the simultaneous existence of a civil marriage to one party and a religious marriage to another.

Under the constitutional division of powers stemming from the *Constitution Act, 1867*,⁸⁰ the federal Parliament has jurisdiction over marriage and divorce. The provincial legislatures, however, under powers that relate to the solemnization of marriage, retain the right to legislate the *formal* conditions for the validity of marriage, such as how many witnesses are required, whether a religious officiant can celebrate the marriage, and which ritual words must be uttered in the creation of all valid civil marriages. Each province regulates these formalities in its own marriage legislation. In addition, the provinces have

80. *Constitution Act, 1867*, *supra* note 78.

adopted a pluralistic model with respect to marriage officiants. Structured into the rules of marriage solemnization is a facility that bestows religious officials with the delegated authority—equal to that of civil bureaucrats—to create a civil marriage simultaneously with a religious marriage.⁸¹

It is significant that any religious marriage ceremony that takes place before, during, or after a civil solemnization is incidental and has no *civil* legal effect in and of itself. These non-civil marriages are legal nullities in the eyes of Canadian law. Celestial unions and marriages performed strictly according to Jewish, Muslim, or Catholic law, for example, are legally irrelevant for the civil law, independent of a coincident period of conjugal cohabitation. Canada's pluralism in the domain of marriage law is distinguishable from the exclusively bureaucratic model of civil marriage in jurisdictions such as France, which only allows civil officials to create a valid civil marriage.

Beyond this pluralism in marriage formation in Canadian law, religious celebration of marriage outside of civil solemnization is not prohibited. There is no requirement in provincial marriage (solemnization) acts or in other Canadian legislation that *compels* a religious community to nominate a civil officiant for all marriages concluded within that community, or compels individual couples within religious communities to get a civil marriage. The state has no say or interest in what constitutes a religious marriage that does not have contact with the civil law, nor with respect to who is qualified to perfect it. Canadian tolerance for religious marriages transacted outside of the civil marriage framework can again be contrasted with jurisdictions such as France, which prohibit, with penal sanctions, the celebration of a religious marriage prior or simultaneous to civil solemnization. The French *Code Penal*, for example, stipulates that

[a]ny minister of religion who habitually conducts religious ceremonies of marriages without being presented beforehand with the marriage certificate received by officials responsible for civil status is punished by six months' imprisonment and a fine of €7,500.⁸²

The tentative implication of these features of Canada's marriage solemnization laws is that Canada *de facto* tolerates plural religious marriages within its territory. This is partly a result of Canada's lack of a mechanism for the identification of

81. See e.g. *Marriage Act*, R.S.O. 1990, c. M.3, s. 20 [*Marriage Act*].

82. Art. 433-21 C. pén., online: <<http://195.83.177.9/code/liste.phtml?lang=uk&c=33&r=3828>>.

informal plural unions, where the parties have never intersected with the state in order to obtain a civil marriage. However, this pragmatic tolerance gets elevated to a legal tolerance in the context of both the civil nullity of religious marriage within Canada and Canada's conflict of laws rules that deal specifically with plural non-civil unions.

The first conflict of laws rule deals with plural unions celebrated by religious communities within countries that do not permit polygamy. Such arrangements are not recognized as valid foreign marriages under civil law. However, no civil consequences will flow from such a religious ceremony.⁸³ Beyond plural religious marriages performed in other countries that prohibit polygamy, private international law regards marriages celebrated in Canada "in non-monogamous form without a preceding ceremony in accordance with Canadian provincial law [as] ... nullit[ies]."⁸⁴ Canadian private international law groups non-civil plural marriage with other forms of civilly meaningless acts. They are as *void ab initio* as would be a marriage within the prohibited degrees of consanguinity,⁸⁵ or as would have been a same-sex marriage prior to the *Civil Marriage Act*⁸⁶ and the court of appeal decisions that sanctioned same-sex marriages.⁸⁷

Under this logic, a plurality of such nullities also amounts to a nullity. To put the implications of the civil nullity of religious marriage succinctly, these unions cross the threshold of potential criminal liability only in the polygamy and bigamy sections of the Act, when they, as a matter of fact, coincide with the status of unmarried cohabitation. Where a plurality of simultaneous religious marriages to different people might intuitively seem to constitute "any form of polygamy"⁸⁸ for the purposes of the polygamy section, the civil nullity of religious marriage reduces the content of the first subsection of the polygamy offence to little more than a tautological phrase: "[e]very one who enters into

83. See Bailey *et al.*, *supra* note 30 at 2.

84. *Qureshi v. Qureshi*, [1971] 1 All E.R. 325. See also Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed. (Markham: LexisNexis Butterworths Canada, 2005) vol. 2, s. 16.6.

85. *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46, s. 2.

86. *Civil Marriage Act*, *supra* note 34.

87. *Hendricks*, *supra* note 56; *EGALE*, *supra* note 56; and *Halpern*, *supra* note 56.

88. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

any form of polygamy commits the indictable offence of polygamy.”⁸⁹ The addition of “any form of polygamy”⁹⁰ to the polygamy section adds nothing that is not covered by “any kind of conjugal union”⁹¹ in the second part of the section. There are other parts of Canadian family law that confirm that religious marriages are not “forms of marriage”⁹² or “conjugal unions”⁹³ for the purposes of bigamy and polygamy—namely, the interaction of the provincial concept of a “lawful impediment to marriage”⁹⁴ and the universal jurisdiction of the *Divorce Act* (1968).

Beyond the registration requirements that enable religious authorities to perform civil marriages, the other key formality required to perfect a civil marriage is the parties’ certification that there is no lawful impediment to their marriage. One such lawful impediment is a prior existing marriage. A person must be unmarried at the time of the marriage ceremony.⁹⁵ Further, in family law, a bigamous marriage is *void ab initio*. As in a religious marriage, it carries no civil consequences in and of itself.⁹⁶ Only the first marriage has civil effect.

The absence of an existing marriage is one of the essential conditions of valid marriage formation and, like the age of consent for marriage, it falls under

89. *Ibid.*

90. *Ibid.*

91. *Ibid.*

92. *Ibid.*, ss. 290, 293 (as amended by R.S., c. C-34, s. 257).

93. *Ibid.*, s. 293 (as amended by R.S., c. C-34, s. 257).

94. I will be drawing on the *Marriage Act* to support my arguments that relate to lawful impediments. See *e.g. Marriage Act*, *supra* note 81, s. 24(3).

In some part of the ceremony, in the presence of the person solemnizing the marriage and witnesses, each of the parties shall declare: ‘I do solemnly declare that I do not know of any lawful impediment why I, AB, may not be joined in matrimony to CD’ ... and each of the parties shall say to the other: ‘I call upon these persons here present to witness that I, AB, do take you, CD, to be my lawful wedded wife (or to be my lawful wedded husband or to be my lawful wedded partner or to be my lawful wedded spouse).

95. Fodden, *supra* note 18 at 23.

96. That said, there are mechanisms in law that allow spouses who, in good faith, thought that they were entering into a monogamous marriage to claim relief under provincial marital property regimes. See *Family Law Act*, *supra* note 77, s. 1. They can also claim relief for spousal support if their void marriage coincides with the requirements for unmarried cohabitation. See *Family Law Act*, *supra* note 77, s. 29. Under this cohabitational umbrella, they are also eligible for third party benefits such as health benefits, Canada Pensions Plan benefits, and insurance claims. See the federal government’s *Modernization of Benefits and Obligations Act*, S.C. 2000, c.12 and its provincial equivalents.

Parliament's jurisdiction. It was not until 2005 that Parliament occupied its jurisdictional authority to define marriage within the *Civil Marriage Act*,⁹⁷ and, when it did, it apparently could not have made it clearer that Canadians are permitted only one marriage at a time: "[m]arriage, for civil purposes, is the lawful union of two persons to the exclusion of all others."⁹⁸ What remains unclear about the Act is whether a prior existing *religious* marriage to one person is a lawful impediment to a civil marriage to another, or whether—consistent with the above analysis of religious marriages as nullities—it is only a prior existing *civil* marriage that precludes one from marrying civilly.

The language of the *Civil Marriage Act* appears to quite self-consciously leave that question alone. The Act explicitly restricts its scope to marriage "for civil purposes."⁹⁹ On the surface, the requirement for each spouse to solemnly declare that he or she knows of no lawful impediment to the marriage would seem to suggest that religiously married spouses must declare the latter as a lawful impediment to civil marriage. The prohibition against bigamous marriage in the *Civil Marriage Act* appears to be reinforced in the criminal prohibition on bigamous marriage under section 290 of the *Criminal Code*, which makes it an offence for anyone who, being married, goes through any other "form of marriage"¹⁰⁰ with another person. Surely, a religious marriage is a form of marriage, even if, as a civil nullity, it does not rise to the status of a civil marriage. If anything creates a lawful impediment to a civil marriage, it would have to be a status that has the capacity to transform a civil marriage into a criminal act. Despite this intuitive understanding, the prevailing interpretation of "lawful impediment," read against the bigamy section in the *Criminal Code* and the way that the *Divorce Act* (1968)¹⁰¹ has been jurisprudentially glossed, suggests

97. *Civil Marriage Act*, *supra* note 34.

98. *Ibid.*, s. 2. This provision overturned, at the national level, the antecedent common law definition of marriage in *Hyde*, *supra* note 57, that, as noted above, defined marriage as "the voluntary union for life of one *man* and one *woman*, to the exclusion of all others" (at 130). The few other sentences in the *Civil Marriage Act* are preambular or clarificatory, and not substantive.

99. *Civil Marriage Act*, *ibid.*

100. *Criminal Code*, *supra* note 13, s. 290.

101. The *Divorce Act* (1968) was followed by the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 7 [*Divorce Act* (1985)], which remains in force. The latter changed important parts of Canada's

that the civil prohibition on bigamy in the *Civil Marriage Act* only applies to multiple civil marriages.

The bigamy section clearly distinguishes “marriage”¹⁰² from “forms of marriage.”¹⁰³ Marriage simpliciter is *civil* marriage. The use of the unqualified words “being married” in the first clause of the section¹⁰⁴ (as distinct from “forms of marriage” in the second clause¹⁰⁵) implies that being married means being *civilly* married. Once bestowed with the official status of civil marriage, the state does not permit that status to be muddled with any other marriage. The prohibition applies to protect the status of a pre-existing civil marriage by prohibiting subsequent formal or informal marriages. This sequence is salient.

This argument about the clarity of civil status is an intuitive way of understanding the mischief in bigamy, as opposed to polygamy. Polygamy is intended to capture the situation of having more than one spouse—or being in a conjugal union with more than one person—simultaneously. The bigamy provisions, on the other hand, speak to the offence of participating in a ceremony of marriage while already civilly married.¹⁰⁶ A bigamous marriage is also a polygamous marriage, while the reverse is not necessarily true. The distinct nature of the bigamy provisions (relating to clarity of status) would be redundant without both the sequential dimension and the first reference to “being married” in the section signifying civil marriage. This understanding of the import of the bigamy section needs to be read congruently with how the *Divorce Act* (1968) has modified what constitutes a lawful impediment to a civil marriage, as well as with the type of relationship that the state adopted with religious family law thereafter.

While Canada has always adopted a pluralistic law of marriage formation, it does not permit any means of dissolving a civil marriage other than through

divorce regime, but left in place the state’s universal jurisdiction over divorce, which was first announced in the 1968 Act and is elaborated upon in this article.

102. “Every one commits bigamy who ... being married, goes through a form of marriage with another person.” *Criminal Code*, *supra* note 13, s. 290.

103. *Ibid.*

104. *Ibid.*

105. *Ibid.*

106. See Angela Campbell, “Bountiful Voices” (2009) 47 Osgoode Hall L.J. 183.

the actions of a civil official—a judge.¹⁰⁷ When Parliament assumed its jurisdiction under section 91(26) of the *Constitution Act, 1867*, it exhausted the field of a national divorce regime with the *Divorce Act* (1968).¹⁰⁸ Canada does not differentiate distinct communities to be organized under discrete principles of religious law or community law without access to the civil benefits and rights enjoyed by ordinary citizens. Canada's divorce legislation is universal, and this has implications for civil bigamy, as well as for the bigamy and polygamy provisions of the *Criminal Code*.

Soon after the *Divorce Act* (1968) was enacted, Canadian courts had to deal with the legal consequences of its universal jurisdiction. One of the earliest cases, *Morris v. Morris*,¹⁰⁹ dealt with the scenario of Jewish *agunot* (bound women). Talmudic law requires the husband to give his wife a bill of divorce and for her to receive it. Sometimes, however, a husband may refuse to give this bill to his wife, and this leaves her bound in marriage.¹¹⁰ While the case refers to the predicament of civilly-divorced Jewish women who remain religiously married, it also captures the predicament of civilly-divorced Catholic spouses who remain indissolubly bound in a religious marriage. One of the majority judges, arguing against the civil enforceability of religious marriages, speculated in the following manner:

Suppose ... that a Catholic wife sought to resist her Catholic husband's petition for divorce on the ground that, having been married according to the Catholic faith, their marriage should be regarded as indissoluble. Such a plea would constitute a challenge to the authority of the court in divorce matters. It would represent an attempt to displace the general divorce law by the law of a particular religion. A plea of that kind would, of course, not be effective to prevent the court from applying the general law.¹¹¹

As an aspect of the “exclusive Legislative Authority of the Parliament of Canada [which] extends to ... Marriage and Divorce”¹¹² (bestowed by section

107. *Divorce Act* (1985), *supra* note 101, s. 7 (“The jurisdiction conferred on a court by this Act to grant a divorce shall be exercised only by a judge of the court without a jury”).

108. *Constitution Act, 1867*, *supra* note 78, s. 91(26).

109. *Morris v. Morris* (1973), 42 D.L.R. (3d) 550 (Man. C.A.) [*Morris*].

110. For a description of the issue and a list of references to Jewish divorce law, see *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607.

111. *Ibid.* at para. 31.

112. *Constitution Act, 1867*, *supra* note 78, s. 91(26).

91 of the *Constitution Act, 1867*), the potentially conflicted co-existence of state and Catholic law is resolved by rendering the latter civilly ineffective, so that it dwells outside of the penumbra of "official"¹¹³ law.

If Catholic family law (which prohibits divorce) retained its legal force *vis-à-vis* Canadian family law, the exclusive ability of the Canadian Parliament to create a single divorce regime for all Canadians would inevitably be compromised. The language of the *Divorce Act* (1968), operative and cited by Justice Guy for *Morris*, was clear about the civil implications for religious law in a civil divorce: "[w]here a decree of divorce has been made absolute under this Act, either party to the former marriage may marry again."¹¹⁴ The clear implication of the scenario created by the *Divorce Act* (1968) is that a persisting religious marriage cannot be a lawful impediment to a civil remarriage. It does not constitute a prior existing marriage for the purposes of provincial marriage solemnization acts.

This situation has been reinforced throughout Canadian case law ever since divorce became an explicit, legislatively entrenched part of the national landscape in 1968. The Jewish wife in the *Morris* case also happened to have been both divorced and *remarried civilly* according to "the perfunctory form prescribed for use by a Judge of the County Court"¹¹⁵—despite a persisting Jewish marriage. The Catholic husband, in Justice Guy's example, is not made liable to polygamy and bigamy charges by remarrying civilly while indissolubly married to another

113. This position underlines the case that has been made out, above, that religious marriages are civil nullities.

114. *Divorce Act* (1968), *supra* note 8, s. 16. This language, which explicitly allowed all Canadian residents to remarry civilly after a civil divorce, has been removed from the *Divorce Act* (1968) and replaced with similar phrasing. However, the phrasing does not clearly articulate the universal and exclusive operation of state-based divorce law. Compare the *Divorce Act* (1985), *supra* note 101, ss. 13 ("On taking effect, a divorce granted under this Act has legal effect throughout Canada"), 14 ("On taking effect, a divorce granted under this Act dissolves the marriage of the spouses"). Despite the difference in phrasing, the common law that has emerged around both Acts nevertheless cements the clear demarcation between "official" and "unofficial" law. A religious divorce, or its absence, remains unable to create or prevent the formation of a subsequent civil marriage.

115. *Morris*, *supra* note 109 at para. 50. For an outline of Ontario's "perfunctory form" of marriage solemnization, see *Marriage Act*, *supra* note 81, s. 24(1)-(2) (allowing a judge or a justice of the peace to perform the marriage "between the hours of 9 o'clock in the morning and 5 o'clock in the afternoon").

partner according to Catholic law.¹¹⁶ Otherwise, the Catholic wife's challenge to the authority of the court in divorce matters (*i.e.*, an attempt to displace the general divorce law with the law of a particular religion) would be effective. Justice Guy is clear that her plea would not have that effect.¹¹⁷ The state cannot create a unified and exclusive jurisdiction for divorce law that thereafter allows Catholics lawful access to civil remarriage upon their civil divorce, and then prosecutes them criminally for doing what they—and all other citizens—are permitted to do through a conjunction of federal divorce legislation and provincial marriage-solemnization legislation.

The logical implication is that Canada tolerates informal bigamy through its tolerance of the simultaneous existence of a civil marriage to one party and a religious marriage to another, particularly in cases where the civil marriage follows the religious marriage. Furthermore, a clearer implication of the post-*Divorce Act* (1968) situation is the jurisprudential exception, carved out for religious marriages, to the *Criminal Code* prohibition against "any form of polygamy."¹¹⁸ Just as "any form of polygamy"¹¹⁹ is rendered precarious by this state of affairs, the phrase "any conjugal union, whether or not it is recognized as a binding form of marriage"¹²⁰ is rendered ambiguous. Are not Jewish and Catholic marriages both forms of conjugal union? What, then, can this phrase mean if those two forms of marriage do not qualify?

It is difficult to justify a sequential distinction between the religious marriage that is followed by a *legitimate* civil marriage to another person, and the civil marriage that is followed by an *illegitimate* (criminally prohibited) religious marriage to another person. If the policy justification of the bigamy provision is to ensure that the status of civil marriage is not muddled by the simultaneous existence of two forms of marriage, then surely there is no difference between the two scenarios. They both confound the civil consequences of civil marriage, leaving unclear the division of property that has been accumulated over the course of the relationship. They also leave uncertain each partner's separate entitle-

116. *Codex Iuris Canonici* 1983 Code c. 1141, online: <http://www.intratext.com/IXT/ENG0017/_P43.HTM> ("A marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death").

117. *Morris*, *supra* note 109 at para. 331.

118. *Criminal Code*, *supra* note 13, s. 293(1)(i) (as amended by R.S., c. C-34, s. 257).

119. *Ibid.*

120. *Ibid.*

ment to spousal support, and which spouse can claim third-party benefits, if any (such as standing in wrongful death suits or immigration sponsorship).

Canadian law has already accommodated the particularities of Jewish and Catholic family law by ensuring that neither group will suffer the indignity of criminal prosecution due to the interaction of the civil divorce law and the criminal bigamy law. The state clearly allows plural marriages to exist for Catholics and Jews (*i.e.*, a persisting religious marriage with a new civil marriage to a separate partner). It is hard to see why other types of plural marriage deriving from this combination of religious and civil law are not uniformly acceptable. Once provincial marriage (solemnization) acts become indifferent to *some* cases of two "forms of marriage"¹²¹ to different spouses, they have no principled way of distinguishing between any combination of a single civil marriage to one person combined with a religious marriage to another. A religion-neutral formulation would have to be formulated, such that an exception for *all* religious marriages would be carved out of "any kind of polygamy" and "conjugal union."¹²²

This religion-neutral interpretation of both the bigamy and polygamy provisions would put all religious marriage laws on the same footing as Jewish and Catholic laws. Such an interpretation would also be consistent with the rest of Canadian law, which regards religious marriages as nullities, and also with the *Civil Marriage Act*, which defines marriage only for *civil purposes*. For these civil purposes, bigamy can continue to be read as prohibiting every person, who is *civilly* married, from going through another *civil* marriage with another person.

In light of the variety of ways in which plural religious unions are permitted in Canadian law, it is hard to single out exactly what residual harm is left in the polygamy section. We have already seen how family law, since the late 1960s, has eviscerated bigamy and polygamy of a fair deal of common-sense meaning, following Lamer's injunction to apply the void for vagueness doctrine to judicial decisions beyond the bare words of a statutory provision. The next section of this article will demonstrate the struggle of articulating the specific criminal mischief (as described in criminal law jurisprudence) that these *Criminal Code* provisions aim to circumvent.

121. See *Criminal Code*, *supra* note 13, ss. 290, 293(1)(i) (as amended by R.S., c. C-34, s. 257).

122. *Ibid.*

IV. ADULTERY AND UNMARRIED COHABITATION

In light of both the legal and the sociological developments that have emerged since the enactment of the polygamy and bigamy provisions, the standard for what constitutes these particular crimes has become exceedingly difficult to articulate. This difficulty arises out of the construal of religious marriages as nullities, and the interaction between the *Divorce Act* (1968), religious law, and the *Criminal Code's* Offences Against Conjugal Rights.¹²³

The difficulty in pinpointing the criminal mischief in polygamy also arises from the paucity of cases that have been prosecuted under the provision since its inception, the most notable of which involved an Aboriginal man (*Bear's Shin Bone*), and the other an "adulterous relationship."¹²⁴ The extraordinarily broad interpretation of conjugal union in *Bear's Shin Bone* needs to be squared with one of the other cases where the polygamy provisions were prosecuted, such as the 1937 case of *R. v. Tolhurst and Wright*. Since this case makes up the rest of the sparse, recorded case law on the polygamy section, we must turn to its antiquated parameters in order to decipher the internal logic of the offence over the first century of its presence in the criminal law. The striking lack of coincidence between the polygamy jurisprudence and contemporary legal understandings of the family in Canadian law underline how much dust has settled on this unused section of the *Criminal Code*.

In the *Tolhurst and Wright* case, James Tolhurst was civilly married to one woman and committed adultery with May Wright, who also happened to be civilly married to another man. Both Tolhurst and Wright were prosecuted for polygamy. In ruling out a conviction, the judge determined that an adulterous

123. *Ibid.* (encompassing both bigamy and polygamy).

124. I will focus principally on the *Tolhurst and Wright* decision from 1937, as both, when read in conjunction with family law developments since the *Divorce Act* (1968), amply show the incoherence of the polygamy provisions. See *Bear's Shin Bone*, *supra* note 71; *R. v. Tolhurst and Wright*, [1937] 3 D.L.R. 808 (Ont. C.A.) [*Tolhurst and Wright*]. For other examples of the scattered (and generally cursory) polygamy and bigamy cases, see *Nan-E-Quis-A-Ka*, *supra* note 74; *R. v. Labrie* (1891), 7 M.L.R. Q.B. 211 (Que. C.A.); *R. v. Liston* (1893), Toronto Assizes (unreported), cited in W. E. Raney, "Bigamy and Divorce" (1898) 34 Can. L.J. 546 at n. (b); *The King v. John Harris* (1906) 11 C.C.C. 254 (Que. C.S.P.); *Dionne v. Pepin* (1934), 40 R. de Jur. 443 (Que. S.C.); *R. v. Clarke* (1959), 124 C.C.C. 284 (Man. C.A.); *R. v. Moore*, [2001] O.J. No. 4513 (Ont. Ct. J.); *R. v. Moustafa*, [1991] O.J. No. 835 (Ont. Ct. J. (Prov. Div.)); *R. v. Sauvé*, [1997] A.J. No. 525 (Alta. Prov. Ct. (Crim. Div.)); and *R. v. Young*, [1965] O.J. No. 498 (Ont. C.A.).

relationship is not a conjugal union. Conjugal unions are only created if they are "in the guise of marriage";¹²⁵ otherwise they are simply unions. In other words, adultery is consistent with monogamy.

This reading of adultery is commensurate with contemporary attitudes in family law about adultery emerging on the margins. Courts appear poised to award spousal support to mistresses in long-term intimate relationships with men who are civilly married to other women, recognizing, for civil purposes, the possibility of multiple simultaneous spouses and the attendant economic vulnerabilities that arise from these relationships.¹²⁶ In *Nowell v. Town Estate*,¹²⁷ the Ontario Court of Appeal awarded the long-term mistress of painter Harold Town a constructive trust in her consort's property, despite his equally long-term marriage to his wife.¹²⁸

Indeed, the contemporary conception of how far an adulterous relationship can be stretched without becoming "any kind of conjugal union"¹²⁹ under the polygamy section underlines how contorted the distinction between the two remains, such that the common phenomenon of adultery continues to remain outside the penumbra of criminal sanction. In *Louis v. Lastman*,¹³⁰ for example, a civil suit for retroactive child support was brought against former Toronto Mayor, Mel Lastman, by his two biological children born to his mistress. Lastman was never charged under the polygamy section. Despite being married himself, Lastman carried out a fourteen-year relationship with a married woman who he had intimate relations with on a regular basis, spoke with on a regular basis, traveled with (staying in motels and resorts around the world), and shared comfort, care, and intimate confidences with (the woman having made herself available to him for emotional support and affection).¹³¹ The non-prosecution of this case under the polygamy section underlines how far an intimate relationship can go without being considered conjugal under the *Criminal Code*. If none of these behaviours rises to "any kind of conjugal

125. *Tolhurst and Wright*, *ibid.* at para. 4.

126. See *Mahoney v. King* (1998), 39 R.F.L. (4th) 361 (Ont. Ct. J. (Gen. Div.)); *Sturges v. Shaw* (2002), 31 R.F.L. (5th) 453 (Ont. Sup. Ct. J.).

127. (1997), 30 R.F.L. (4th) 107 (Ont. C.A.).

128. *Ibid.*

129. *Ibid.*

130. [2001] 18 R.F.L. (5th) 311 (Ont. Sup. Ct. J.) [*Louie*].

131. *Ibid.*

union”¹³² under the *Criminal Code*, the criminal mischief of polygamy becomes all the more inscrutable.

Drawing on the sparse jurisprudential guideposts of cases like *Tolhurst and Wright* in an attempt to arrive at a principled definition of polygamy under the *Criminal Code*, it might appear that the mischief in the polygamy provisions involves a party sustaining not only a civil marriage, but also a simultaneous long-term marriage-like relationship—a type of relationship not unlike the one that persisted in *Louie*. In other words, one might suggest that *Tolhurst and Wright* stands for the proposition that a brief sexual fling with one party, while being civilly married to another, is not going to attract the concern of the polygamy provisions, while living together as husband and wife (as Bear’s Shin Bone did) with two different women at the same time is, in fact, going to give rise to such a concern. The real mischief, on this basis, is maintaining a home and a conjugal life with one spouse, while being civilly married to another.

This suggestion for a principled civil definition of polygamy is not supported by the facts of *Tolhurst and Wright*. Not only did Tolhurst live with Wright “as man and wife,”¹³³ they also had four children together. They might have been committing *mere* adultery *vis-à-vis* their civil marriages, but their relationship could not fit more squarely within the current definitions of common law spouse. In Ontario, for example, that definition is construed as cohabiting together in a conjugal relationship for a period of not less than three years or in a relationship of some permanence if both are the parents of a child.¹³⁴ Wright bore a minimum of four children and raised them with Tolhurst, which meant that not only were Tolhurst and Wright in a relationship of some permanence with a child, they also surpassed the criterion set by most provincial family law legislation for childless couples (*i.e.*, when the four nine-month pregnancies are added up, leaving aside any associated years of child rearing), which alone accounted for thirty-six months (*i.e.*, three years).

According to the facts of *Tolhurst and Wright*—and the logic that ensues from those facts—statutory unmarried cohabitation is not “in the guise of marriage,”¹³⁵

132. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

133. *Tolhurst and Wright*, *supra* note 124 at para. 1.

134. *Family Law Act*, *supra* note 77, s. 29.

135. *Tolhurst and Wright*, *supra* note 124 at para. 4.

nor in a form of "conjugal union,"¹³⁶ nor "any form of polygamy"¹³⁷ for the purposes of the polygamy provisions. Instead, long-term unmarried cohabitation to one spouse, with or without children, appears to be consistent with monogamy to another. Living in unmarried cohabitation while being civilly married to another does not constitute polygamy. *A fortiori*, if simultaneous unmarried cohabitation and civil marriage to different people do not court the polygamy provisions, two simultaneous cohabitational relationships will not either. The inexorable logic of the extant criminal cases on the polygamy offence therefore seems to be that Canadian law appears to tolerate plural unmarried cohabitation.

The criminal law judgment in *Tolhurst and Wright* is clearly out of step with contemporary legal understandings of cohabitational relationships. Where the judge in *Tolhurst* saw no marriage-like relationship in an enduring adulterous one, even the *Criminal Code* now defines "common-law partners" as those who cohabit in a conjugal relationship for a period of at least one year.¹³⁸ The emphasis on *formal* conjugality in the Ontario Court of Appeal in 1937 has now been turned on its head, such that the *formal* conjugality of civil or religious marriage is irrelevant in law, and the *functional* conjugality of the union is the locus to which courts must turn to in order to determine the mischief of polygamy. Again, the concept of conjugality bears the full weight of the offence of polygamy—a weight that is too precariously perched and cannot support itself.

Before finally considering this heavily burdened concept of conjugal union, there is a cognate area of law worth canvassing that also speaks to Justice Lamer's requirement that vagueness be examined by looking beyond the bare words of the statutory provision to the provision as it is interpreted and applied in judicial decisions.¹³⁹ This corner of jurisprudence involves the question of criminal indecency in the context of polyamory.

V. SEXUAL MISCHIEF

If, on the dated authority of *Tolhurst and Wright*, it is not living together with one person while being civilly married to another that is problematic, it might

136. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

137. *Ibid.*

138. *Criminal Code*, *supra* note 13, s. 2.

139. *Prostitution Reference*, *supra* note 11 at para. 40.

appear that the mischief in the polygamy provision is concerned with the prospect of a party having ongoing simultaneous sexual congress with one party, while being civilly married to another. However, recent polyamory case law affirms that sex with one partner, while being civilly married to and in a sexually-active relationship with another, does not constitute polygamy.

In the 1982 case of *R. v. Mason*,¹⁴⁰ an Ontario court held that 'swinging' (spouse-swapping) parties, in a private non-commercial setting, does not constitute an indecent act for the purposes of the *Criminal Code*. Husbands and wives (common law and civilly married) can freely invite other sexual partners into their homes for the pleasure of either or both. The acceptability of home-based swinging to prevailing community standards was complemented at the Supreme Court by the acceptability of swinging in bars. In the 2005 case of *R. v. Labaye*,¹⁴¹ the accused operated a club in Montréal, the purpose of which was to permit couples (married or not) and single people to meet each other for group sex. Labaye was charged with keeping a common bawdy-house under section 210(1) of the *Criminal Code*. The question of whether swinging is consistent with polygamy has not been tested directly by the polyamory cases. However, the fact that the SCC has found that swinging in private homes and clubs does not amount to a criminal act speaks to whatever mischief can be discerned in the polygamy provisions.

The offence of keeping a common bawdy-house is defined by reference to the slippery concept of "indecenty."¹⁴² The central issue in *Labaye* was whether running a club for group sex and the swapping of partners constituted the facilitation of acts of indecenty. Setting a threshold for indecenty became the fulcrum of the case, and the concept of harm is at the centre of the mischief of indecenty. In acquitting the accused, the SCC made clear that the Crown had failed to establish that any harm had been committed, the threshold for which was set by determining whether the conduct confronts the public with behaviour that interferes with their autonomy and liberty, pre-disposes others to anti-social behaviour, or

140. (1982), 59 C.C.C. (2d) 461 (Ont. Prov. Ct. (Crim. Div.)).

141. [2005] 3 S.C.R. 728 [*Labaye*].

142. See *Criminal Code*, *supra* note 13, s. 210(1) (dealing with the offence of keeping a common "bawdy-house," which, in turn, is defined in s. 197(1) as a place kept or occupied, or resorted to "by one or more persons for the purpose of prostitution or the practice of acts of indecenty").

physically or psychologically harms the people involved in the conduct.¹⁴³ The harm also needs to be incompatible with the proper functioning of society.

In the case of swinging, in so far as the activity was taking place in a private setting, the threshold of harm was not met. The privacy, behind which group sex was veiled, eliminated potential harm to the liberty rights of other citizens through confrontation. It also eliminated fears about the fostering of anti-social behaviour in others, which "can arise only if members of the public may be exposed to the conduct or material in question."¹⁴⁴ On the question of whether swinging is incompatible with the proper functioning of society, the court also invoked the privacy of the behaviour to inoculate the activity from posing a risk of harm to society's proper functioning. The court further clarifies that "[v]ague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behaviour will not suffice."¹⁴⁵ Mr. Labaye was not guilty of indecency because he made sure that only willing people would see the sexual conduct.

The facts of *Labaye* speak to the types of plural and simultaneous sexual partnering that are generally not the norm within polygamous unions. *A fortiori*, the judgment indicates that whatever sexual activity occurs between consenting adults within polygamous unions also fails to meet the threshold of harm requisite for indecency, most particularly because polygamous unions, like marriages in general, conduct their erotic lives in private. Further, recapitulating the Court's assessment of harm in the context of polygamy, "vague generalizations"¹⁴⁶ that polygamy "will lead to attitudinal changes and hence anti-social behaviour will not suffice"¹⁴⁷ to establish the harm of polygamy.

The *Labaye* case appears to speak definitively to any conjecture that the criminal mischief in polygamy is related to indecent sexual acts. Multiple simultaneous sexual partners (married or otherwise) are not indecent in criminal law; multiple *sequential* partners (married or not) within plural unions then fall substantially short of the threshold of harm. The polyamory cases therefore go some distance to further eviscerating the content of the polygamy provisions.

143. *Labaye*, *supra* note 141 at para. 62.

144. *Ibid.* at para. 47.

145. *Ibid.* at para. 58.

146. *Ibid.* at para. 58.

147. *Ibid.*

The result in *Labaye* stands for the proposition that sexual activity, in general, within polygamous unions is not the targeted harm. Consensual sexual activity between adults is covered by privacy.

In light of the foregoing analysis, it appears that the remaining hallmark of the criminal mischief in polygamy must be the situation where a person has more than one spouse at the same time. Clearly, swinging is not the problem. Rather, it appears to be the point at which the relationship with each sexual partner becomes spouse-like that the mischief in polygamy is activated. This identification of the mischief gets us close to the second part of section 293—"conjugal unions"—which is the only part of the section that appears to remain standing once all of the other exceptions to polygamy have been carved out by the substratum of values that has churned up the legal landscape over the last half-century. Perhaps it seems viable that multiple *conjugal unions* might have a purchase in this exercise; in other words, it seems that the original drafters of the polygamy provisions nailed it when they referenced polygamy to conjugality.

It remains to be seen whether this last understanding of the mischief in polygamy holds any merit. Once the meaning of conjugal union is determined, it follows that more than one of those types of union at the same time, with separate people, will presumably represent the behaviour that criminal law forbids. This search for a definition of conjugal union takes us away from the criminal law, which does not itself define what constitutes this form of relationship. To get a clear sense of what is meant by conjugality, we need to return to family law, which has spent the last forty years trying to clarify the term since the *Divorce Act* (1968) opened up a revolution in the ways that the "family" is legally structured and sociologically conceived. It is in family law that both statutes and cases have struggled to clarify open-ended statutory language through judicial interpretation.

VI. CONJUGAL UNIONS

Let us leave aside for a moment the unquestioned assumption that we have good reason to care so much that a swinging partner stays in the bed a bit too long and whips up a batch of French toast a few times too many. Let us also ignore the unquestioned assumption that we have good reason to care even if none of the parties themselves seem to mind. In other words, let us discount the search for a principled policy justification for whatever residual understand-

ing of conjugality is left in the Offences Against Conjugal Rights¹⁴⁸ once swinging, adultery, religious marriage, and (on the polygamy section's jurisprudence) even unmarried cohabitation are removed from consideration. The definition of conjugal union has enough difficulty on its own.

To determine whether or not someone is simultaneously in two or more spouse-like relationships, we would first need to determine what it is to be spouse-like (*i.e.*, determine exactly what makes a spouse a spouse). We need a clear sense of the concept of spouse (that which is at the essence of the married relationship) in order to determine whether or not someone has multiple, simultaneous spouses and whether or not they are in a common law, religious, or civil marriage.

Identifying what the essence of the marriage relationship is for the purposes of determining what is marriage-like, in the absence of the actual solemnization ceremony, has proven to be an increasingly elusive quest. The institution of marriage now contains such an extensive array of variants (*i.e.*, with or without children, living in the same or separate residences, with or without sexual activity, with traditional, equal, or reverse-traditional gender roles, and so on) that it is difficult to identify anything more than patterns across a range of marriages, rather than a set of essential criteria. Furthermore, the frequency of committed relationships flourishing beyond the boundaries of civil marriage is increasing, with the result that the law has been restructured to attach similar legal consequences to both married and unmarried relationships.¹⁴⁹

The growing frequency at which couples are declining to enter into civil marriages while persisting in committed relationships has led to a significant overhaul of both federal and provincial legislation. This reform, which is meant to accommodate the aforementioned sociological shift of the last half-century, became most pressing when it coincided with a sequence of successful gay-rights cases that saw governments ungraciously scrambling to recognize same-

148. *Criminal Code*, *supra* note 13, ss. 290, 293 (as amended by R.S., c. C-34, s. 257).

149. The 2007 Statistics Canada report on changing family demographics indicates that, between 2001 and 2006, the number of cohabiting families in Canada grew by 18.9 per cent, five times faster than married couples, to form 15.5 per cent of census families in the country. See Statistics Canada, Demography Division, *Family Portrait: Continuity and Change in Canadian Families and Households in 2006, 2006 Census* by Anne Milan, Mireille Vézina & Carrie Wells (Ottawa: Minister of Industry, 2007) at 6, 9, online: <http://dsp-psd.pwgsc.gc.ca/collection_2007/statcan/97-553-X/97-553-XIE2006001.pdf>.

sex spouses without changing the definition of marriage. This statutory overhaul of the concept of spouse was stimulated by a series of SCC cases that found that discrimination on the basis of either marital status or sexual orientation creates unconstitutional violations of the right to equal treatment under the law. Two cases in particular, *Miron v. Trudel*¹⁵⁰ and *M. v. H.*,¹⁵¹ led to a massive overhaul of the legislative landscape. Sixty-seven federal statutes and numerous provincial statutes were amended to ensure that unmarried cohabitants, whether in same-sex or opposite-sex relationships, would have the same rights as married spouses in both fields of legislative activity. Legislation dealing with matters from tax deductions to pensions, death benefits to intestate inheritance, and standing in wrongful death suits to immigration sponsorship now draws upon the concept of a conjugal union in order to demarcate between those who qualify and those who do not.

The statutory definition of a cohabiting spouse typically stipulates a specific period of cohabitation, generally ranging from one to three years, after which legal consequences ensue (depending on the statute). For entry into unmarried cohabitation, the statutory period substitutes for the single event of a solemnization ceremony. Out of this definition flow legal consequences that are closely assimilated, if not identical, to those that arise from marriage. However, it is not simply living together that attracts this marriage-like status. There is an ineffable something more that transforms housemates of one to three years into spouses.

Embedded in the definition of cohabitation in different federal and provincial statutory regimes is a reference to conjugality. For example, *Ontario's Family Law Act*¹⁵² defines cohabitation as "liv[ing] together in a *conjugal relationship*, whether within or outside marriage."¹⁵³ Those who live together, but are not in a conjugal relationship, would be disqualified or exempted from any provisions that relate to *spousal* cohabitation. Someone who lives non-conjugally with another (even beyond the three year mark) will not owe spousal support, will not be a pension beneficiary, will not be able to sue for the other's wrongful death, will not inherit property when the other dies intestate, and so on. Therefore,

150. [1995] 2 S.C.R. 418.

151. [1999] 2 S.C.R. 3 [*M. v. H.*].

152. *Family Law Act*, *supra* note 77.

153. *Ibid.*, s. 1(1) [emphasis added].

this concept of conjugality has become the proxy for determining what is spouse-like or marriage-like behaviour.

Presumably, the notion of conjugality would help to determine what it is to live "under the guise of marriage"¹⁵⁴ for the purposes of the polygamy provisions, given that the other elements appear to have been read out of them. The concept of conjugality, however, has merely displaced the difficulty of understanding what is spouse-like or "under the guise of marriage"¹⁵⁵ with a term that is laced with ambiguity. The legal content of the concept has been filled in by judicial interpretation, and that interpretation has changed over time.

There are two principal ways in which conjugality has been defined in common law: one is subjective and the other functional. The former is now dated and the latter is fairly confused. Both ways of construing what constitutes spouse-like or marriage-like cohabitation are canvassed in a compelling article by Brenda Cossman and Bruce Ryder.¹⁵⁶ They depict the test for the subjective equivalence of a relationship to marriage as one hinged upon whether an unmarried cohabiting couple has voluntarily embraced such a status. The touchstone of whether the relationship is conjugal is the nature of their subjective intentions. In the case of spousal support, for example, the test would rely upon whether the couple pledged to mutually support each other.¹⁵⁷

This approach is now dated by virtue of the fact that courts have found it difficult to discern a common intention, either because the parties might have had different intentions, or because they lacked a clear intention at all over the course of the relationship's evolution. More significant, however, was the emergence of the pressing policy objective to protect cohabitants (particularly women) from the economic disadvantages that arise during an interdependent relationship. These are the same concerns that allow courts to read constructive trusts into property owned by one spouse who has been unjustly enriched by the other spouse's unremunerated domestic contribution. The former spouse's subjective intention cannot be permitted to circumvent the economic interdependence and concomitant legal responsibilities that emerge from the way that the parties

154. *Tolhurst and Wright, supra* note 124 at para. 4.

155. *Ibid.*

156. Cossman & Ryder, "Marriage-Like," *supra* note 23.

157. *Ibid.*

structure their relationship. Because of such considerations, the subjective test has fallen out of judicial favour.

The functional equivalence test has emerged in tandem with the demise of the subjective approach. This approach to the determination of whether a relationship is marriage-like relies upon an identification of the basic dimensions and functions of a marital relationship to which the relationship in question is compared. The 1980 *Molodowich v. Penttinen*¹⁵⁸ case consolidates the functional attributes laid out in prior case law. In *M. v. H.*, Justice Cory recapitulates and endorses the *Molodowich* approach when he notes that "the generally accepted characteristics of a conjugal relationship ... include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple."¹⁵⁹ However, not all of these elements will necessarily be present in all married relationships. The functional equivalence of conjugality with this loose agglomeration of marital attributes is problematic. Cossman and Ryder underline these drawbacks and argue that the concept of functional equivalence to marriage has grown increasingly tenuous in the light of jurisprudential developments.

The first attenuation of the test derives from the dissociation of sexual relations and conjugality—popularly thought to be the latter's *sine qua non*. As Cossman and Ryder note, Canadian judges have begun to find conjugality in the absence of sexual relations. Alongside Justice Cory's views on this matter in *M. v. H.*, they cite the 1990 *Richardson v. Richardson*¹⁶⁰ case, in which the judge held that

The parties may, for a number of reasons, such as age, illness or indifference, choose not to have sexual relations but still live together and hold themselves out to be husband and wife in other respects. For that reason, it is my view that the trial judge was wrong to have made sexual relations between the parties a requisite for a conjugal relationship.¹⁶¹

While this dissociation of conjugality from sexual relations leaves the functional equivalence test baffling for family law, it also makes it that much more difficult to discern the mischief in the polygamy provisions.

158. (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.).

159. *M. v. H.*, *supra* note 151 at para. 59.

160. *Richardson v. Richardson* (1990), 107 N.B.R. (2d) 49 (C.A.).

161. *Ibid.*

Another drawback of the functional test—not just for a finding of polygamy, but for all legislative regimes that rely upon the concept of conjugality—is the privacy-violating nature of the inquiries that courts must pursue in order to establish it. This is most evident with respect to the dimensions of sexual and personal behaviour to which Justice Cory alludes. Although sexual relations may not be necessary to a finding of conjugality using the *Molodowich* criteria, the functionalist approach has led courts to engage in a strikingly intrusive (if not unseemly) set of questions. The judge in the 1978 case of *Stoikiewicz v. Filas*¹⁶² illustrates the type of questioning that proves the point about unseemliness:

Q: Mrs. Stoikiewicz, did you live with Mr. Filas as husband and wife?

A: That's the way it was.

Q: Did you share the same bedroom?

A: No.

Q: I see. Did you have sexual relations with each other?

A: Yes.

Q: Was it frequent or just occasional?

A: Occasional. From time to time.

Q: Did you cook his meals?

A: I cooked for him.¹⁶³

The actual finding in *Stoikiewicz* was that a conjugal relationship did *not* exist, despite the answers to these questions. More to the point is the nature of the inquiry upon which the court had to embark in order to establish this finding. Taking into account that the polygamy provisions permit swinging and adultery, it is easy to imagine that the hair-splitting distinctions between this monogamy-commensurate behaviour, and sexual and personal relations that are not monogamy-commensurate, could only become more unseemly and offensive.

It is worth reiterating at this point that, aside from the concern about the unseemliness and intrusiveness of inquiries into the kind of sexual activity that goes on behind the doors of polygamous unions, this line of questioning is verboten for establishing the crime of polygamy. As argued above, it follows from *Labaye* that sexual activity with multiple consenting partners (including spouses), provided that it is conducted in private, does not constitute a criminal harm in

162. *Stoikiewicz v. Filas* (1978), 7 R.F.L. (2d) 366 (Ont. Fam. Ct.).

163. *Ibid.* at para. 3.

polygamy. If swinging and private orgies with (or without) one's spouse are not indecent, then surely there is nothing in the sexual activity of polygamy that rises to an act of indecency.

While the job of a family law judge may be made harder by the reference to sexual activity as a recurrent commonality in conjugal unions, the job of a criminal law judge looking for proof of conjugality for the purposes of "any conjugal union"¹⁶⁴ is made lighter by *Labaye*'s elimination of consensual adult sexual activity from the set of mischiefs that might constitute the criminal act of polygamy. The elimination of sexual activity from the repertoire of harms embedded within "any kind of conjugal union with more than one person at the same time"¹⁶⁵ further renders conjugality into a vapidness for criminal law.

There is one further drawback pointed out by Cossman and Ryder that perhaps demolishes the use of conjugality far more swiftly for the polygamy provisions. As they note, none of the criteria in the functional-equivalence test are essential. The test does not provide a kind of bright line distinction between conjugal and non-conjugal relationships. Citing Justice Cory, they note how the test has become extraordinarily open-ended:

In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is conjugal. ... Courts have wisely determined that the approach to determining whether a relationship is conjugal must be flexible. This must be so, for the relationships of all couples will vary widely.¹⁶⁶

While the flexibility inherent in this test allows courts to find conjugality where an exact equivalence with an ideal model of marriage cannot be found, the result is an astonishing lack of clarity that impedes the ability of couples to anticipate when they do or do not qualify. As Cossman and Ryder point out: "in sacrificing clarity and predictability for flexibility and diversity, the judicial understanding of conjugality now comes close to an 'I know it when I see it' approach."¹⁶⁷ While the conceptual looseness in the concept of conjugality may be problematic for family law, it is poised to be fatal for criminal law.

164. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

165. *Ibid.*

166. *M. v. H.*, *supra* note 151 at paras. 60-61.

167. Cossman & Ryder, "Marriage-Like," *supra* note 23 at 299.

If the state cares enough to make a distinction between swinging, adultery, and polygamy—so much so that it is prepared to attach the potential jeopardy of five years imprisonment to the behaviour—then a reasonable person should be able to foresee when their behaviour enters the prohibited zone. They should not have to wait upon the intuitions of an oracular judge.

VII. VOID FOR VAGUENESS

Taking into account all of the above-mentioned statutory and jurisprudential understandings of what constitutes a “form of marriage,”¹⁶⁸ “any form of polygamy,”¹⁶⁹ and “any kind of conjugal union, whether or not it is by law recognized as a binding form of marriage,”¹⁷⁰ it becomes virtually impossible to articulate what the criminal conception of polygamy amounts to and what the core mischief is that underlies it. In short, it becomes virtually impossible for the provisions to constitute fair notice that particular conduct falls within the scope of the offence.

On its own literal terms, the polygamy section has an exceptional reach in the concept of “any kind of conjugal union.”¹⁷¹ However, all manner of exceptions have been jurisprudentially carved out of this spectacularly broad spectrum of relationships. What remains after the “bare words of the statutory provision”¹⁷² are understood in *Tolhurst and Wright*, *Bear's Shin Bone*, *Morris*, and *Lastman* is an incoherent miscellany of ideas that is held together by a common law thread of “conjuality,” which is itself frayed and torn. This jurisprudence does not tie the concept into place when conjoined with the fact that unmarried cohabitation, adulterous affairs (both short and long-term, with and without children), and religious marriages are not conjugal unions for the polygamy provision, and do not serve as lawful impediments to civil marriage either.

While it is clear that no law can meet the standard of absolute certainty, the principles of both fair notice to citizens (particularly for criminal law, where individual liberty is in jeopardy) and limitation of enforcement discretion indicate strongly that the current polygamy section offends the principles of fundamental

168. *Criminal Code*, supra note 13, ss. 290, 293 (as amended by R.S., c. C-34, s. 257).

169. *Ibid.*, s. 293 (as amended by R.S., c. C-34, s. 257).

170. *Ibid.*

171. *Ibid.*

172. *Prostitution Reference*, supra note 11 at para. 40.

justice that are set out in section 7 of the *Charter*. This is particularly true in light of a massive shift in the substratum of values regarding family and sexuality since the late 1960s—a substratum that is accessible to all Canadians who might otherwise lack access to the technicalities of formal notice, and which also provides the moral foreseeability of harm, while generating the substantive notice that inoculates legal enactments against claims of arbitrariness.¹⁷³

That the vagueness of the polygamy section is susceptible of generating a “standardless sweep”¹⁷⁴—and that it opens the door for “law enforcement officials to pursue their personal predilections”¹⁷⁵—can already be seen in the lamentable history of its highly discriminate use against minority religious groups and marginalized Aboriginal people. The hypocrisy of pursuing openly polygamous relationships, while leaving typically occult, long-term adulterous relationships intact—relationships which appear functionally to serve very similar purposes to polygamy for men—further underlines the unprincipled motivations driving the law. Bearing in mind case law, subsequent statutory law in a range of fields, and social developments over the last century, it becomes extraordinarily difficult to state what the criminal conception of polygamy amounts to, apart from a mechanism to discipline and convict socially and politically marginalized groups. As a result of all of these developments, there is no way to salvage the polygamy provisions and to give “sensible meaning”¹⁷⁶ to their terms.

If the provisions are nullified by the courts, it will be up to Parliament to devise a modified definition of polygamy that captures whatever acceptable mischief remains once the original objective has been excised.¹⁷⁷ Yet Parliament will not have a clean slate from which to create a new polygamy law. It will have to legislate on top of the landscape of the entire statutory and jurisprudential history elaborated above—a history that would force Parliament into navigating the inconceivably narrow straits left behind by all of the exceptions.

173. *NS Pharmaceutical*, *supra* note 36.

174. *Prostitution Reference*, *supra* note 11 at para. 41.

175. *Ibid.* at para. 40. Again, both of these dangers were critiqued in Justice Lamer’s disquisition on void for vagueness.

176. *Ibid.*

177. Obviously, I am assuming that Parliament will not invoke the notwithstanding clause, which it did not seriously contemplate doing for same-sex marriage, and cannot contemplate doing without violating a longstanding customary prohibition on invoking a clause that allows Parliament to pass legislation that unequivocally violates fundamental human rights.

It seems clear, therefore, that the polygamy provisions of the *Criminal Code* are unconstitutional under section 7 of the *Charter*. What remains to be done is an analysis of whether the provision can be saved under section 1 of the *Charter*—an argument that is ultimately unsustainable. The section 1 analysis is important, given that one of the most common arguments made for retaining the polygamy section, despite a foreseeable violation of other fundamental rights in the *Constitution Act, 1982*, is that the underlying purpose of the section protects interests that are paramount in Canadian society—specifically, the vulnerabilities of women and children—and that entrench our international commitments under the United Nations *Convention to Eliminate all forms of Discrimination against Women* (CEDAW).¹⁷⁸ These latter concerns are often articulated as the residual concerns upon which the polygamy section pivots. Whether these latter-day attempts to identify polygamy's criminal mischief might be sustainable under a section 1 analysis becomes a part of this article's search for coherence in the *Criminal Code's* polygamy doctrine.

VIII. RESIDUAL PURPOSES

An argument under section 1 of the *Charter*, that there is a pressing and substantial objective that should override our concerns about the violation of citizens' constitutionally-entrenched rights to liberty, may be jeopardized by the existence of the objective that originally animated the prohibition—that is, to isolate and prosecute religious minorities. The unsavory history of the selective use of the provision against Aboriginal people supports the idea that the polygamy provision was crafted as a means of disciplining and colonizing socially and politically marginal groups. If there is an alternate pressing and substantial objective, it has to overcome the historical suffusion of the polygamy provisions with the unacceptable original objective of targeting religious minorities.

In their report to the Status of Women Canada, Bailey *et al.* argue that "[t]he prohibition's ecclesiastical origin as well as its express reference to Mormons suggests that its pressing and substantial objective is to serve a religious purpose."¹⁷⁹ Even if the more contemporary justification for a prohibition on polygamy stems

178. *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981), online: <<http://www2.ohchr.org/english/law/cedaw.htm>> [CEDAW].

179. Bailey *et al.*, *supra* note 30 at 23.

from concerns about the vulnerabilities of women and children, “the Supreme Court of Canada will not entertain shifting purposes, meaning that the government can rely only on the purpose that animated the provision when it was enacted.”¹⁸⁰ They argue that, in the face of a finding that the prohibition on polygamy infringes the section 2(a) right to freedom of religion, the Crown will have difficulty establishing that the impugned provision is of sufficient importance under section 1 to warrant overriding a constitutionally protected right. The original religious objectives of the legislation—even if now suffused with a concern for the equality rights of women—are unlikely to be considered pressing and substantial enough, as the law of this country has come out from under the shadow of Christian marriage.

This argument about the shifting purposes of the polygamy provisions may not ultimately hold when implying, as it does, that Parliament is precluded from embodying new social objectives in modified, although used, legislative flasks. To be compelling, this argument would need to establish that religious objectives continue to animate the legislation. The fact that the *Criminal Code* was amended in the 1950s to remove explicit references to a now prohibited religious objective would suggest that the original anti-Mormon animus of the section has been expunged.

However, those who argue that the original religious purpose has been overtaken by the pressing and substantial purpose of protecting vulnerable women and children within plural unions¹⁸¹ may face just as difficult a challenge in establishing that the government was preoccupied with this guiding concern in 1954.¹⁸² The amendment, which dropped the reference to Mormons in 1954, was part of a general overhaul of the *Criminal Code* in the early 1950s in order to modernize its content and remove antiquated formulations and offences. As per the reasoning in *Big M*, deciphering the purpose of legislation hinges upon “the

180. *Ibid.* at 23. For their “shifting purposes” argument, Bailey *et al.* rely upon both *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M*] and *R. v. Zundel*, [1992] 2 S.C.R. 731.

181. See Bala, *supra* note 32; Cook & Kelly, *supra* note 42.

182. Under the first branch of the Oakes test (to determine which claims about limiting rights are justifiable under section 1 of the Charter). “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” *Charter*, *supra* note 5, s. 1. See also Bala, *ibid.*

intent of those who drafted and enacted the legislation at the time.”¹⁸³ The Crown is precluded from ascribing a new purpose to legislation in the course of *Charter* litigation. Arguments that reference a child and woman-centred preoccupation underlying section 293 will need to square this conception of polygamy’s paramount harm with legislative history.

The legislative history of the polygamy section may, in any event, be of diminished importance with respect to its constitutionality. Even if the guiding concern of protecting women and children were acknowledged to be its pressing and substantial aim, the contemporary objective of protecting them may in fact be far more easily and fairly met through other laws and social policies that are more rationally connected with this goal than through the criminalization of polygamy. The extraordinary vagueness and overbreadth of the polygamy provision generates an extremely high threshold that must be met in order to justify the violation of section 7 liberty rights. Further, this threshold is reinforced by the abundance of ways that are available to meet the objective, such that no harm is done to religious freedom, liberty, equality interests, or fundamental justice. Even if the protection of women and children was acknowledged to be the section’s overarching purpose, the question that remains is whether or not the criminal prohibition of polygamy is a proportionate response to these concerns.

I will concede, because I readily perceive it to be true, that this is not a frivolous objective with little or no social import. The protection of vulnerable women and children from the asymmetries inherent in plural marriages (which are virtually always polygynous rather than polyandrous) is an objective that has accrued a great deal of scientific support in the last several decades. There is an abundance of reports from around the world that support the voices of women who have fled from, or feel trapped within, polygamous unions.¹⁸⁴ Further, this objective is embodied in the CEDAW. In its General Recommendation on Equality in Marriage and Family Relations,¹⁸⁵ CEDAW urges that “[p]olygamous marriage contravenes a woman’s right to equality with men, and can have such serious emotional and

183. *Big M*, *supra* note 180 at para. 91.

184. For a particularly committed presentation of this case, see Cook & Kelly, *supra* note 42. For a review of this literature, see also Bailey *et al.*, *supra* note 30.

185. CEDAW, *supra* note 178 at General Recommendation No. 21 (13th session, 1994), online: <<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>>.

financial consequences for her and her dependants that such marriages ought to be discouraged and prohibited.”¹⁸⁶

Canada, as a party to the CEDAW, has committed itself to “take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.”¹⁸⁷ How, then, can Canada uphold this international commitment and uphold its legitimate aspiration to liberate women and their dependents from the serious emotional and financial consequences that can arise from polygamy? Is criminalizing plural marriage the only means of meeting that international commitment? Is it the most effective?

As has already been argued, the overbreadth of section 293, in catching “[e]very one”¹⁸⁸ who engages in a plural union, is radically at odds with the feminist objective; women in plural unions are subject to being torn away from their children for up to five years in a federal penitentiary, while their children are deprived of a mother for a yawning black hole of time—just as they stand to be deprived of their fathers. The stigma of criminal prosecution and conviction (and in the case of Bountiful, public scrutiny and shaming in the national media) can only add to the burdens of the very parties that the law purports to protect. Further, the deprivation of either one or both of the parents leaves children poised to experience extreme levels of emotional and financial turbulence. The criminalization of both parties to the union also adds a thick layer of wariness and caution to any aspirations that such women might entertain in anticipation of the state’s safety net capturing their fall, should they exit the relationship.

These contradictions between the polygamy provision and its purported objective strongly suggest that the criminalization of plural unions is not the least drastic means for meeting that objective.¹⁸⁹ Are there other, less punitive means of meeting the objective of lightening the miseries and inequalities to which women in plural forms of marriage may be prone? If they exist, then the minimal impairment test of section 1 of the *Charter* will not be met by the current polygamy provision. Let me suggest that such measures are in abundance, many of which are already in place and merely awaiting the removal of criminal stigmatization

186. *Ibid.*, art. 16(14).

187. *Ibid.*, art. 16.

188. *Criminal Code*, *supra* note 13, s. 293 (as amended by R.S., c. C-34, s. 257).

189. For the requirements of the minimal impairment test, see *Charter*, *supra* note 5, s. 1.

in order for women in oppressive plural unions to exit the relationships with the same confidence as women in oppressive monogamous unions.

A substantial movement towards the objective has already been made by ensuring that civil consequences, such as spousal support, flow from the factual reality of all relationships that endure for the statutory period of cohabitation for common-law spouses (generally one to three years, depending on which federal or provincial statute is in play, and/or for relations of some permanence with a child). Whether or not a union is polygamous, these entitlements flow from the duration of the relationship. This *de facto* entitlement to spousal support also computes with the new Federal *Spousal Support Advisory Guidelines*,¹⁹⁰ which roots the entitlement to spousal support in the duration of the relationship and the parenting obligations that parties incur.¹⁹¹

Another substantial movement flows from the fact that child custody and child support are not dependent upon the legitimacy of the form of marriage. Family law legislation across Canada's provinces brought about an end to the distinction between legitimate and illegitimate children in the 1970s. Child support obligations are linked to the biological relationship between the parents and their children, as well as to the social relation between children and those parents who stand *in loco parentis* (in the place of a parent).¹⁹² The fact that parties to a polygamous union are entitled to use the constructive-trust doctrines to establish a beneficial interest in accumulated marital property, if they can establish a contribution to it, makes it easier for all women to exit degrading and abusive relationships, whether or not those unions are polygamous or monogamous.

In the definition of those spouses who have access to the default property regime of married spouses, legislation such as the *Ontario Family Law Act* already includes marriages that are actually or potentially polygamous when celebrated in a jurisdiction whose system of law recognizes them as valid.¹⁹³ If courts (which have yet to weigh in on what this provision means) were to interpret the section to mean that all polygamous marriages, whether or not they are formed in Canada, give rise to rights in the default statutory marital-property regime, this

190. See Department of Justice Canada, *Spousal Support Advisory Guidelines* by Carol Rogerson & Rollie Thompson, (Toronto: Family, Children and Youth Section, Department of Justice Canada, 2008), online: <<http://www.justice.gc.ca/eng/pi/pad-rpad/res/spag/index.html>>.

191. *Ibid.*

192. *Divorce Act* (1968), *supra* note 8, s. 2(2)(a).

193. *Family Law Act*, *supra* note 77, s. 1(2).

would bolster the ability of women in polygamous unions to leave without confronting the debilitating fear of poverty.

It would also help to eliminate the inequities and grave emotional and financial consequences that are suffered by the women in polygamous marriage relationships, if provincial social-assistance rates were raised to such an extent that abused women across Canada would no longer feel that remaining in an abusive relationship would be preferable to the indignities and acute deprivations of welfare.¹⁹⁴ In addition, all oppressed wives, whether in common law relationships, monogamous marriages, or polygamous unions, would be rescued by the rising tide of a sorely needed national daycare system that would permit single mothers to work (or train for work), while leaving their young children in affordable and adequate child-care arrangements.

All of these measures (and many more) would go, and have gone, a substantial way to meeting Canada's commitment under the CEDAW to "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations,"¹⁹⁵ regardless of whether those women have come from plural or monogamous unions. However, there is another measure that Canada could take that would entrench—in a more global, albeit symbolic, way—its specific international commitment with respect to polygamy. Parliament could do so in a manner that might well skirt the constitutional problems that plague the polygamy provisions: they could leave the *Civil Marriage Act* in place, untouched, and modify the bigamy provisions, to unequivocally state that the only form of criminally prohibited plural union is that of two simultaneous civil marriages to different partners.

The *Civil Marriage Act* already only refers to marriages "for civil purposes,"¹⁹⁶ and confines them to monogamous unions. The bigamy provision already appears, on a reasonable interpretation, to uniquely prohibit everyone who is civilly married from entering into another *civil* marriage with another person. The section needs only to be cleaned up in order to explicitly meet this objective—that is, the objective of maintaining clarity around the status of *civil* marriage. This latter

194. See Janet Mosher *et al.*, "Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System – Final Report of Research Findings from the Woman and Abuse Welfare Research Project" (5 April 2004), online: <http://www.yorku.ca/yorkweb/special/Welfare_Report_walking_on_eggshells_final_report.pdf>.

195. CEDAW, *supra* note 178.

196. *Civil Marriage Act*, *supra* note 34, s. 2.

objective may continue to have value if Canadians continue to prefer (as they appear to do by an increasingly narrow margin)¹⁹⁷ civil marriage to unmarried cohabitation. All bigamous civil unions would be captured by this newly clarified bigamy provision—leaving things such as religious marriages, adultery, and mistresses alone, as none of the state's business. Spouses in each of the latter arrangements would remain capable of acquiring benefits under the status of unmarried cohabitation or statutory and equitable regimes.

For good measure, Parliament could also finally occupy the jurisdictional field it was given in 1867 and stipulate a minimum age requirement for consent to marriage, while entrenching the common law requirement for bilateral consent as a necessary condition between marriage partners. These legislative modifications would reflect the prevailing Canadian sensibility about the precious, yet vulnerable, integrity of young people and the vital importance of women's agency within married life. They would find further legitimacy in the broader social policies that have consolidated among the community of nations. Canada's commitment to this larger community is embodied in its formal assent to the CEDAW provisions that require the government to ensure that women and men have: "(a) the same right to enter marriage, (b) the same right to freely choose a spouse and to enter into marriage only with their free and full consent."¹⁹⁸

All of this is contingent on how the Canadian State continues to regulate what has become an almost purely symbolic institution: civil marriage. As the state now recognizes all of the forms of economic interdependence formally captured by the institution of marriage (e.g., unmarried cohabitation, constructive trust, and third party rights and obligations relating to cohabiting spouses), only residual amounts of light can be seen between civil marriage and unmarried cohabitation.¹⁹⁹ The gesture of continuing to legislate and regulate civil mar-

197. Quebec is now leading in the direction away from the preference for civil marriage over unmarried cohabitation. Over 30 per cent of couples in Quebec are in civil unions. This is two-and-a-half times the rate in other provinces and territories (34.6 per cent in Quebec compared to 13.4 per cent in the rest of the country). See Milan, Vézina & Wells, *supra* note 149 at 7.

198. CEDAW, *supra* note 178, arts. 16(a), (b).

199. Access to the default property regime for marital property is the most significant remaining difference following *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325 [*Walsh*]. The constructive trust regime, to which unmarried cohabitants have access on dissolution of their relationship, approximates the presumption of equal sharing in the default regime to which married couples have access. However, acquiring a constructive trust in a cohabitating spouse's assets is a less certain outcome, and the regime provides

riage would be a purely symbolic tip of the hat to Canada's commitment under the CEDAW.

Already, arguments have been raised about whether even this bare commitment to civil monogamy can be constitutionally sustained.²⁰⁰ As noted above, the right to liberty secured under section 7 of the *Charter*, implicating the fundamental liberty to choose which partner one marries—and also how many—may be in competition with any pressing and substantial objective of clarifying the status of civil marriage or symbolically entrenching the CEDAW in the *Civil Marriage Act* and its bigamy provision.

In any event, the specific harms associated with sexual integrity that are now voiced in the concerns about a minimum age for, and consent to, valid marriages are already captured in the prohibitions on sexual exploitation and sexual interference, as well as by the post-1983 removal from the *Criminal Code* of marriage as a defence to sexual assault. All of these offences may indeed be easier to establish if they are not hidden behind the thick veil of legitimacy and privacy provided by the institution of marriage. Entrenching a definition of monogamy for the purposes of both criminal and family law may be merely symbolic, but its symbolic freight can occlude some of the most pernicious harms that the entrenchment of the CEDAW in civil and criminal definitions of marriage was intended to prevent.

Whether or not Parliament were to define civil marriage as monogamous in both the *Civil Marriage Act* and the *Criminal Code*, with the abundance of means available at Parliament's disposal to meet its legitimate commitment under the CEDAW—and with regard to the justified concerns about women's rights that have transformed the landscape of the Canadian family over the last forty years—the moral perils inherent in the criminalization of polygamy need to be deeply weighed and re-considered.

more latitude for judicial departure from presumed equality of contribution. As Rollie Thompson notes in *Annotation to Walsh v. Bona* (2003), 32 R.F.L. (5th) 87 at 92, "the law in this area has become more incoherent, inconsistent and unpredictable. Vague tests of 'juristic reason' and 'direct link' and 'value received/survived' leave much room for subjective and stereotyped interpretations of roles and contributions." The gap between the default regime and constructive trusts is one that is felt by women in both monogamous and polygamous cohabitational relationships.

200. See Bailey *et al.*, *supra* note 30 at 19ff.

IX. CONCLUSION

The polygamy charges and the fraught legal history emerging from Bountiful, British Columbia, have provided us with an opportunity to re-evaluate where we have stood as a society with respect to plural unions ever since the *Criminal Code* first prohibited polygamy in 1892. While this re-appraisal may be taking place on an informal level, with ordinary Canadians pondering whether and how their values might accommodate non-monogamous family arrangements, the formal law must also account for the substratum of values that has shifted over the last century—and, most particularly, over the last forty years. The sociological shifts of this substratum have been reflected in changes that have been made in both statutory and case law over this time. It is this latter, legal context that courts turn to in determining whether or not a standing legal provision is capable of both providing fair notice to citizens about culpable behaviour and limiting enforcement discretion, such that this discretion is prevented from veering towards standardless sweeps. I have argued in this article that the polygamy provision is no longer a constitutionally sustainable piece of legislation.

Decades of family law reform and refinements of the criminal law have rendered the polygamy provision's harm inscrutable. Religious and other non-civil marriages have long been reduced to civil nullities by the state. When Canada passed its first divorce act in 1968, it assumed universal jurisdiction over divorce, allowing those in religiously indissoluble marriages to re-marry civilly as long as their prior civil marriage was dissolved. Prior existing religious marriages were no longer regarded as lawful impediments to civil marriage, and neither were they considered forms of marriage or conjugal unions for the purposes of the polygamy provision.

Changes in marriage and divorce law were accompanied by a transformation in social attitudes towards unmarried cohabitation. A couple living together for a duration sufficient to raise four children (as in *Tolhurst and Wright*) were not considered to be living in a conjugal union for the purposes of the polygamy provision in 1937. Indeed, neither were their unions otherwise recognized for the benefit of family law. Formal marriage was considered to be *the* significant social and legal event of the time. Sixty years later, functional conjugality—the nexus of spouse-like activities in which a cohabiting couple engage—sets the threshold for almost as many of the resources of family law as marriage itself. Meanwhile, the content of the institution of marriage has become more fluid

and diverse. Commensurately, the content of the pivotal concept in the polygamy provision—conjugal—has become fluid and open-ended to the point of having no legal meaning at all.

Throughout these developments and, indeed, long before polygamy was prohibited in 1892, male sexual infidelity has not been regarded as a perilous foray over the edge of monogamy and into the territory of polygamy. The polygamy section's own case law tolerates the conjunction of monogamous marriage and adultery, even adultery of an extended duration and with the result of multiple children. More recently, swinging and other forms of polyamory have found their place alongside other forms of coupling, and these activities have been regarded in law as, minimally, not indecent.

Given the range of behaviours and arrangements that the law views as consistent with monogamy, it has become increasingly difficult to decipher the specific harm that the polygamy provision is intended to thwart. Enough formal and functional exceptions have been carved out of the section to cover just about every form of human coupling. As a result, the section has been left hanging, and is vulnerable to the charge that it should now be considered void for vagueness and an unconstitutional violation of the right to life, liberty, and security of the person.

Beyond the unconstitutionality of the provision, and in light of over a century's worth of tolerances, the prosecution of particular plural unions appears to court both legal incoherence and social hypocrisy. Worse, the singling out of minority groups for practices that are functionally no different from what the majority population has tolerated and accommodated over the last century leaves the polygamy provision poised to trigger concerns about xenophobia and racism. Such concerns have grounding in the discriminatory way that that provision was originally formulated and subsequently invoked.

The social, legal, and constitutional deficiencies of the polygamy provision will be weighed against concerns about vulnerable family members in plural arrangements. This article has argued that these latter considerations do not outweigh the perils of the ongoing criminalization of polygamy. Concerns about the vulnerabilities of women and children that have, to a large extent, driven the reforms of family law over the last four decades were lamentably absent from the polygamy provision's first sixty years in the *Criminal Code*. These concerns remain pressing for women in Canadian society at large, not just for women and children in unconventional family arrangements. Both the amplitude

and the paucity of legal and social resources for vulnerable family members fall indiscriminately on women in both monogamous and polygamous unions.

Ultimately, the conjunction of the polygamy section's inscrutability with its tendency to allow for selective targeting of minority groups has rendered the section suspect and unworthy of the Canadian tradition of reasonable accommodation of difference. If Canadian law needs some adjustments to ensure that all women, including those in polygamous unions, have equal access to the concrete securities that make our options tangible and attainable—providing us with the most robust exercise of the agency that Canadian society is able to offer—then that should be done in a manner that does not single out religious, social, and political minorities for a singular form of scrutiny, discipline, persecution, and paranoia.

